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Title: Supreme Court of Virginia and David B. Beach, its
Clerk, Appellants
v.
Myrna E. Friedman

Docketed:
September 4, 1987

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for appellant: Lucyk, Gregory E.

Counsel for appellee: Hitchcock, Cornish F.

NOTE* Notice of Appeal filed 8/25/87

Entry	Date	Note	Proceedings and Orders
1	Sep 4 1987	G	Statement as to jurisdiction filed.
2	Oct 2 1987		Motion of appellee Myrna E. Friedman to affirm filed.
3	Oct 7 1987		DISTRIBUTED. October 30, 1987
4	Oct 7 1987		REDISTRIBUTED. October 30, 1987
5	Nov 2 1987		PROBABLE JURISDICTION NOTED. *****
6	Dec 19 1987		Joint appendix filed.
7	Dec 19 1987		Brief of appellants Sup. Ct. of Va, et al. filed.
8	Dec 19 1987		Brief amici curiae of Wyoming, et al. filed.
9	Dec 21 1987		Record filed.
		*	Certified original record and C.A. proceedings, 2 volumes, received.
11	Jan 4 1988		Order extending time to file brief of appellee on the merits until February 4, 1988.
12	Feb 4 1988		Brief amicus curiae of American Corporate Counsel Assn. filed.
13	Feb 4 1988		Brief amicus curiae of New York State Bar filed.
14	Feb 4 1988		Brief of appellee Myrna E. Friedman filed.
15	Feb 4 1988		Lodgings received. (2 copies).
17	Feb 5 1988		SET FOR ARGUMENT, March 21, 1988. (1st Case).
16	Feb 8 1988		CIRCULATED.
18	Mar 3 1988	X	Reply brief of appellants Supreme Court of VA, et al. filed.
19	Mar 21 1988		ARGUED.

87-399

No. 87-_____

FILED
SEP 4 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

**SUPREME COURT OF VIRGINIA, and
its Clerk, DAVID B. BEACH,**

Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

**ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED BY THE APPEAL

1. Is admission to a state's bar, without taking and passing that state's bar examination, a fundamental right protected by the privileges and immunities clauses of Article IV, Section 2 of the United States Constitution?
2. Does the privileges and immunities clause invalidate the Supreme Court of Virginia's determination that there are substantial reasons for requiring an applicant for licensure, who is already admitted to the bar of another state, to either (1) take and pass the Virginia bar examination, or (2) reside in the Commonwealth in lieu of examination, in order to demonstrate a commitment by the applicant of service to the jurisdiction, and to ensure the attainment by the applicant of proficiency in Virginia law and procedure?
3. Does the privileges and immunities clause impose a stringent standard of justification against the Supreme Court of Virginia's rule requiring residence for admission to the bar without examination where there is no clear discrimination against non-residents, and where any resident of any state may be admitted to practice in Virginia by taking and passing the bar examination?

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IN THE Supreme Court of the United States

OCTOBER TERM, 1987

**SUPREME COURT OF VIRGINIA, and
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Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

**ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT**

OPINIONS BELOW

The memorandum order of the United States District Court for the Eastern District of Virginia was not reported and is set forth in the Appendix to the Jurisdictional Statement at Appendix B, p. A-15.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court has not yet been officially reported, and is included in the Appendix to the Jurisdictional Statement at Appendix A, p. A-1.

JURISDICTION

The appellee, plaintiff in the District Court, brought this action to declare Rule 1A:1 of the Rules of the Supreme Court of Virginia unconstitutional and to enjoin its enforcement by the Virginia Supreme Court, pursuant to 42 U.S.C. § 1983. Jurisdiction in the District Court was predicated upon 28 U.S.C. §§ 1331 and 1343.

The Supreme Court of Virginia now appeals from the judgment of the United States Court of Appeals for the Fourth Circuit. The Court of Appeals issued its opinion affirming the District Court on June 12, 1987, and entered an order denying the Virginia Supreme Court's Petition for Rehearing and Suggestion for Rehearing In Banc on July 22, 1987. The Court of Appeals issued an order staying its mandate on July 22, 1987, and on August 25, 1987, the Virginia Supreme Court filed its Notice of Appeal in the Court of Appeals.

The jurisdiction of this Court on appeal is invoked under 28 U.S.C. § 1254(2). Virginia Supreme Court Rule 1A:1 is a "state statute" within the meaning of 28 U.S.C. § 1254(2) and 1257. See e.g., *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); and *United States v. Howard*, 352 U.S. 212 (1957).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The privileges and immunities clauses, Article IV, § 2 of the United States Constitution provides in pertinent part:

"the citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States.

Virginia Supreme Court Rule 1A:1 is set forth in full in the Appendix to this Jurisdictional Statement at Appendix C, p. A-16. In summary, the rule provides for admission to the Virginia Bar without examination for an attorney who has been licensed to practice law in another jurisdiction for at least

five years. The applicant attorney seeking admission without examination must establish that he or she:

- "(a) Is a proper person to practice law;
- (b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination;
- (c) Has become a permanent resident of the Commonwealth, and;
- (d) Intends to practice full-time as a member of the Virginia bar."

The Supreme Court of Virginia has construed the residency provision of Rule 1A:1(c) as a "date of admission" requirement. *Matter of Titus*, 213 Va. 289, 191 S.E.2d 798 (1972). The full-time practice requirement of Rule 1A:1(d) has been interpreted to mean that an applicant must intend to open an office in Virginia for the practice of law and engage regularly in the practice of law in Virginia from that office. *In Re Brown*, 213 Va. 282, 191 S.E.2d 812 (1972).

STATEMENT OF THE CASE

The appellee, Myrna E. Friedman, is a resident of Maryland. She was admitted to the Illinois bar by examination in 1977 and the District of Columbia bar by reciprocity in 1980. She worked as a corporate attorney in the District of Columbia for four years, and prior to that was employed for five years in the office of General Counsel of the United States Navy. In January, 1986, she took a job as Associate General Counsel for ERC International, Inc., a "professional services company" located in Vienna, Virginia.

In June, 1986, she applied for admission to the Virginia bar without examination pursuant to Rule 1A:1. The cover letter attached to her application stated that she intended to reside in Maryland. Her National Conference of Bar Examiners Questionnaire included with her application also disclosed that she had applied for admission to the Maryland bar at that same time.

On June 17, 1986, the Clerk of the Supreme Court of Virginia responded to Friedman, advising her that because she was not a permanent resident of Virginia, she was not eligible for admission to the Virginia bar without examination, and her application fees were returned to her.

On September 25, 1986, Friedman filed a complaint in the United States District Court for the Eastern District of Virginia against the Supreme Court of Virginia and its Clerk, David B. Beach, asserting that the residency requirement of Rule 1A:1 violated the United States Constitution, including the privileges and immunities clause contained in Article IV, § 2. The issues presented to this Court were initially raised in the district court in cross-motions for summary judgment filed by Friedman and the Virginia Supreme Court. On November 14, 1986, the district court entered an order granting Friedman's motion for summary judgment and declaring the requirement of residence for admission without examination violative of privileges and immunities. On December 19, 1986, the district court entered a further order staying its judgment pending appeal.

The issues now raised in this appeal were asserted by the appellants, the Virginia Supreme Court and its Clerk, in their appeal to the United States Court of Appeals for the Fourth Circuit. On June 12, 1987, a panel of the court of appeals consisting of Winter, Chief Judge, Ervin, Circuit Judge, and Young, United States District Judge for the District of Maryland, sitting by designation, issued its opinion affirming the district court's judgment. The appellant's Petition for Rehearing In Banc was denied on July 22, 1987, and on July 31, 1987, the court of appeals entered an order staying its mandate pending appeal to this Court. Appellants timely filed their Notice of Appeal with the court of appeals.

REASONS WHY PLENARY CONSIDERATION IS REQUIRED

I. THE COURT OF APPEALS' HOLDING THAT ADMISSION TO A STATE'S BAR WITHOUT EXAMINATION IS A FUNDAMENTAL RIGHT PROTECTED BY THE PRIVILEGES AND IMMUNITIES CLAUSE DEPARTS FROM THIS COURT'S PRECEDENTS AND HAS CREATED A CONFLICT AMONG THE CIRCUITS ON THIS ISSUE.

A. Introduction

This case squarely presents the question of whether the Privileges and Immunities Clause of the United States Constitution compels a state to admit to practice before her courts non-resident attorneys who have not established their competence by taking and passing the state's bar examination. The court of appeals' decision declaring appellee Friedman exempt from the Virginia bar examination represents the first federal appellate level holding that admission to a state's bar without examination is a "privilege" protected by Article IV, § 2. In reaching this conclusion, the court of appeals has departed from this Court's decisions defining not only the scope of the privileges and immunities clause, but also the power of the states to regulate their bars, and has directly contradicted holdings of the federal courts in the Seventh and Tenth Circuits.

It is noted that of the twenty-eight states which offer reciprocity admission with no examination, at least seven states¹ require residence in the state as a condition for such admission to supplant the assurances of commitment to the jurisdiction and proficiency in local law otherwise demonstrated by the bar examination. It is also noted that since 1985 at least four states² have dropped reciprocal admissions

¹Illinois, Indiana, Iowa, Ohio, Rhode Island, Virginia, Wyoming.

²Arkansas, Kansas, Montana, Utah.

altogether due to the uncertain nature of the law in this area. Plenary consideration by the Court should be given to this case in order to provide specific and authoritative guidance to the states regarding the appropriate constitutional limitations and standards governing their power of discretionary bar admission, and to resolve the conflict which now exists among the Courts of Appeal on this issue.

B. The Court of Appeals' Opinion Departs From the Applicable Decisions of this Court.

Application of the privileges and immunities clause to a state's discrimination against an out-of-state resident requires use of a two-prong test. *United Building and Construction Trades Council of Camden County v. Mayor and Council of Camden*, 465 U.S. 208 (1984). Initially, the court must determine whether the discrimination burdens privileges and immunities protected by the Constitution. *Id.* at 218. If this initial question is answered affirmatively, only then must the court consider (i) whether a "substantial reason" for the discrimination exists, and (ii) whether the discrimination bears a close or substantial relationship to the state's objective.

There is no question that the *practice of law* is a privilege protected by Article IV, § 2. This court so held in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), and struck down a state rule which burdened this privilege by *totally excluding* non-residents from admission to practice.³ A critical element of this Court's holding, however, was the fact that Kathryn Piper had passed the New Hampshire bar examination, and thus had established by an objective measure that she fulfilled "the same professional and personal

³It is noted that *Piper's* holding is not dispositive here, because non-residents are not excluded from practicing law in Virginia. Admission to the Virginia bar may be obtained, without regard to residence, by simply taking and passing the bar examination, and the record in this case establishes that thirteen percent of all active practitioners enrolled in the Virginia bar (1,871 out of 14,314) are non-residents admitted by examination.

qualification⁵ required of resident lawyers." *Piper, supra*, 470 U.S. at 283 n.16. Simply stated, *Piper* makes clear that the protected "privilege" of practicing law does not arise until the state's bar admission requirements have been met, including the requirement that the applicant for admission take and pass the state's bar examination.

This conclusion was confirmed by this Court's more recent decision in *Frazier v. Heebe*, _____ U.S. _____, 107 S.Ct. 2607, 96 L.Ed.2d 557 (June 19, 1987), which was handed down after the court of appeals' decision here. In *Frazier*, this Court held that a Louisiana federal district court was not empowered to adopt local rules requiring attorneys admitted to the Louisiana bar by examination, to live in or maintain an office in that state, in order to gain admission to the federal court's bar. The Court rejected the Louisiana court's assertion that non-resident attorneys are "less competent" than resident attorneys, but in so finding relied specifically on the ground that the out-of-state attorneys seeking admission to the federal court's bar had *established* their competence by taking and passing the Louisiana bar examination. The Court stated:

Indeed, there is no reason to believe that *nonresident attorneys who have passed the Louisiana bar exam* are less competent than resident attorneys. The competence of the former group in local and federal law has been tested and demonstrated *to the same extent* as that of Louisiana lawyers, and its members are equally qualified.

Frazier, supra, _____ U.S. at _____, 96 L.Ed.2d at 566 (emphasis added). This language makes clear the view that out-of-state attorneys are not entitled to a "presumption" of competence unless they have taken and passed the admitting jurisdiction's bar examination. This Court also observed in *Frazier* that the bar examination serves as a "substantial incentive" for the out-of-state lawyer to keep abreast of local rules and procedures, and evidence the non-resident attorney's

willingness and commitment to provide service to the jurisdiction: "A lawyer's application to a particular bar is likely to be based on the expectation of a considerable local practice, since it requires the *personal investment* of taking the state bar examination and paying fees and annual dues." *Frazier, supra*, 96 L.Ed.2d at 566-67. Finally, this Court specifically approved the requirement of an examination for non-resident attorneys as a "more effective means" for ensuring lawyer competence than "complete exclusion" from the bar. *Id.* at 567.

In this case, the court of appeals declared the practice of law to be a protected privilege *per se*, with no requirement that an applicant establish a commitment to the jurisdiction or demonstrate knowledge or proficiency in local law. Indeed, the court of appeals declared that the bar examination itself is a burden on the privilege of practicing law, because it "requires the payment of a fee; it involves the time and expense of becoming acquainted with state law through appropriate study materials or review courses; it results in a period of delay for successful applicants before they may be admitted to the bar . . . and, of course, the bar examination itself involves the risk that even an experienced attorney may fail." *Friedman, supra*, Appendix at 8a. In effect, the court of appeals held that there is a fundamental privilege protected by Article IV, § 2 to practice law without examination in every state which chooses to make some form of reciprocity admission available. This holding is an unwarranted expansion of the privileges and immunities clause, and of this Court's decision in *Piper*.

The opinion in *Piper* analyzed the policies underlying the privileges and immunities clause, observing that the clause applies "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the nation as a single entity," *Piper, supra*, 470 U.S. at 279, or which may be regarded "'fundamental' to the promotion of interstate harmony." *Id.* *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978). Discretionary admission without examination, however, has never been regarded as fundamental to our national interest. As this Court stated in *Leis v. Flynt*, 439 U.S. 438 (1979), a case dealing with discretionary *pro hac vice* admission:

"There is no right of federal origin that permits [out of state] lawyers to appear in state courts without meeting the state's bar admission requirements. This Court, on several occasions, has sustained state bar rules that excluded out of state counsel from practice altogether or on a case by case basis. *See, Norfolk v. Western R. Co. v. Beatty*, 423 U.S. 1009 (1975), *summarily aff'g* 400 F. Supp. 234 (S.D. Ill.); *Brown v. Supreme Court of Virginia*, 414 U.S. 1034 (1973), *summarily aff'g* 359 F. Supp. 549 (E.D. Va.) *Cf. Hicks v. Miranda*, 422 U.S. 332, 343-345 (1975). These decisions recognize that the Constitution does not require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another." *Id.* at 433.

The *Leis* case and cases cited therein make clear that there is no overriding national interest in bar admission without meeting a state's bar admission requirements which bears on "the vitality of the nation as a single entity," nor can admission without examination be viewed as "fundamental" to our national interest. So long as a non-resident may gain admission to a state's bar, without regard to his or her residence, by taking and passing the state's bar examination, there is no discrimination which burdens a privilege protected by Article IV, § 2, and no cause of action under the Privileges and Immunities Clause.

C. The Court of Appeals' Decision Creates A Conflict Among the Circuits.

Two other federal courts have held that the requirement of taking and passing a bar examination does not impose a "burden" or "prohibitive condition" on the privilege of engaging in the practice of law, and have affirmed against Article IV, § 2 challenges state rules conditioning waiver of the examination upon residence in the state.

This was the conclusion reached by United States Court of Appeals for the Seventh Circuit in *Sestric v. Clark*, 765 F.2d

655 (7th Cir. 1985), *cert. den.*, 106 S.Ct. 862 (1986), a decision directly at odds with the Fourth Circuit's holding in the case at bar. The *Sestric* court upheld against a privileges and immunities challenge the Illinois reciprocity rule which required residence in the state as a condition for admission without examination, although non-residents could be admitted by taking and passing the Illinois bar examination. The Court, distinguishing *Piper*, found that the "privilege" to be evaluated was not the privilege to practice law generally, but the narrower issue of whether there was a protected privilege to practice law without passing the State's bar examination. The *Sestric* Court found that residence was a "substitute commitment" for taking and passing the bar examination, and concluded that while requiring non-residents to take the bar examination may be "inconveniencing," it "would not do much damage to the policy of the privileges and immunities clause." *Sestric*, *supra*, 765 F.2d at 658-59.

More recently, in *Sommermeier v. Supreme Court of Wyoming*, 659 F. Supp. 207 (D. Wyo. 1987), the United States District Court for the District of Wyoming reached this same conclusion in upholding against an Article IV, § 2 challenge the Wyoming Supreme Court's residency rule for admission without examination. Again, the court distinguished *Piper*, finding that while the opportunity to pursue the practice of law is a fundamental right, the requirement of the bar examination is not a "prohibitive condition" in the pursuit of that right. *Id.* at 209. The court upheld Wyoming's contention that residence was a substitute for, rather than a supplement, to taking and passing the bar examination. "[T]he Court is hard pressed to see how avoiding the exam, by itself, contributes to national unity, the national economy or any other values which the privileges and immunities clause seeks to protect." *Id.* Sommermeier has appealed the district court's decision, and that case is now pending in the United States Court of Appeals for the Tenth Circuit, *Sommermeier v. Supreme Court of Wyoming*, *et al.*, No. 87-1811 (Filed June 2, 1987).

In light of the foregoing, the Supreme Court of Virginia submits that the decision of the United States Court of Appeals for the Fourth Circuit should not be permitted to stand, and that this Court should note probable jurisdiction in order to consider whether admission without examination is a fundamental privilege protected by Article IV, § 2, and resolve the conflict among the circuits.

II. THIS COURT SHOULD GRANT PLENARY REVIEW TO CLARIFY THE AUTHORITY OF A STATE TO REQUIRE SOME SHOWING OF PROFESSIONAL COMMITMENT AND COMPETENCE AMONG ATTORNEYS ADMITTED TO HER BAR WITHOUT EXAMINATION.

It is well settled that the Virginia Supreme Court has "a compelling interest" in the regulation of the practice of law within its borders, *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), and it may demand "high standards" of personal and professional qualifications, including a commitment to the jurisdiction and a demonstration of competence in Virginia law, from attorneys it admits to practice before its courts. *Piper*, *supra* at 283-84 n.16; *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). The Virginia Supreme Court has made a determination that for attorneys seeking multiple bar memberships, the required commitment and competence can be established by either taking and passing the bar examination, or by residing and practicing full-time in the Commonwealth. These requirements are interdependent. The full-time practice requirement assures that the untested attorney, through frequent exposure to Virginia cases and clients, will become proficient in Virginia law,⁴ while residence supplies the lawyer's personal commitment to the jurisdiction.

⁴The "full-time practice" requirement of the Virginia rule was upheld against Due Process and Commerce Clause Challenges in *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859 (4th Cir. 1985), *cert denied*, 106 S.Ct. 862 (1986).

which would otherwise be demonstrated by the considerable personal investment required in taking and passing the bar examination. The Virginia Supreme Court also relies upon residence in the State to ensure *compliance* by the untested attorney with full-time practice by requiring the multi-jurisdictional practitioner to *give up* his ties to his former jurisdiction, and to concentrate his practice and commitment to the Virginia bar.

The court of appeals rejected this effort by the Virginia Supreme Court to balance the benefits of reciprocity admission with the compelling need to maintain the personal commitment and professional competence of the bar. The court concluded that there was no substantial reason for the difference in treatment between untested attorneys who live within the state, and those living in other states—asserting that *neither residence nor the bar examination* “further the state goal of enhancing the quality of legal practitioners in the state.” *Friedman, supra*, Appendix at 12a. Moreover, the court of appeals did not address at all in its opinion Virginia’s assertion that residence demonstrated a commitment to the jurisdiction otherwise shown by taking the bar examination. And finally, in striking down Virginia’s requirement of residence for admission without the examination only, the court of appeals attempted to distinguish the decision of the Seventh Circuit in *Sestric v. Clark, supra*, and in so doing, implicitly *approved* the residence requirement at issue there. The court of appeals noted that because Illinois did not have a “full-time practice” provision, the residence requirement served a legitimate purpose - to ensure that out-of-state attorneys were not “proposing to supplement their existing practice.” *Friedman, supra*, Appendix at 11a.⁵ However, this is precisely the reason that Virginia seeks to require residence for admission without

⁵It should be noted that Illinois does require an attorney seeking admission without examination to assert “that upon admission to the bar he will actively and continuously engage in the practice of law in Illinois.” *Sestric, supra*, 765 F.2d at 662, quoting Ill. Bar Rule 705(d).

examination. It is illogical that this purpose should be “substantial” in the Seventh Circuit but not in the Fourth Circuit. It does not strain reason to conclude that out-of-state applicants who seek membership in the Virginia bar will retain their membership in the bar of one or more other states in which they are admitted.⁶ They may be associated with a firm in their jurisdiction of origin, or like many “general practitioners,” also operate out of an office in the home. They will likely have an established body of clients who would continue to seek legal services in their home jurisdiction. As a member of the bar of another jurisdiction, the non-resident attorney would have an obligation to support and participate in bar activities, provide pro bono services, and otherwise fulfill his or her “commitment” to service to that jurisdiction. Accordingly, it is much more likely that a non-resident attorney, notwithstanding his or her promise of full-time practice in one state, would be inclined to divide his or her practice and commitment among these competing jurisdictions. The fact that Virginia may have adopted a more effective program than Illinois, including residence *and* full-time practice for ensuring that out-of-state attorneys do not use the vehicle for admission without examination to simply “supplement their existing practice,” should not be a ground for striking down the Virginia Supreme Court’s efforts to maintain a committed and competent bar. If residence may be upheld, as in *Sestric*, to enforce the untested attorney’s asserted commitment to the Virginia bar, then it must likewise be a legitimate measure in the Virginia rule to enforce the untested attorney’s asserted commitment to the Virginia bar. In this case, the court of appeals has failed to give appropriate deference to the clearly a legitimate means chosen by the Virginia Supreme court to achieve a balance between the benefits of reciprocity admission with the need to maintain the personal commitment and professional competence of the bar.

⁶The appellee in this case, for instance, is already admitted to the Illinois and District of Columbia bars, and her application for admission to the Virginia bar disclosed that she was seeking admission to the Maryland bar at the same time.

Moreover, the opinion of the court of appeals casts a cloud over the authority of the states to implement discretionary measures in lieu of examination regulating the personal and professional qualifications of practitioners admitted to their bars. The opinion apparently rejects the requirement of a commitment to the jurisdiction as a legitimate state objective; implies that a state may require either residence, or full-time practice, but not both, to ensure proficiency in local law; and contrary to the views of this Court, and the Supreme Court of Virginia, disclaims the propriety or utility of the bar examination altogether. The court of appeals offers no real guidance in this area, but instead directs the Virginia Supreme Court to presume the competence of all non-resident lawyers, and declares that an "annual promise" is enough to establish the non-resident lawyer's commitment to the Virginia bar. This is not sufficient. The Supreme Court of Virginia submits that plenary review should be undertaken in this case to clarify and provide guidance to the states regarding the appropriate constitutional limitations and standards governing their power to establish conditions for discretionary admission to the bar.

Finally, the Virginia Supreme Court does not believe its bar admission certificate should be treated as an "honorarium" or a "collectible" to be hung on law office walls across the country. The Virginia Supreme Court demands, as it has a right to, that its attorneys have a strong commitment to the bar and to clients in Virginia, and that they be knowledgeable and proficient in Virginia law and procedure. The requirement of residency in lieu of the bar examination clearly bears a substantial connection to this legitimate objective. The Court of Appeals' decision should not be permitted to stand. It ignores the teachings of this Court, obscures the authority of the states to exact professional competence, and creates a conflict among the circuits which ought to be resolved by this Court.

CONCLUSION

For the reasons stated, the Supreme Court of Virginia urges this Court to note probable jurisdiction and to schedule this case for plenary consideration by the Court.

Respectfully submitted,

SUPREME COURT OF VIRGINIA;
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APPENDIX

PUBLISHED

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 86-3170

MYRNA E. FRIEDMAN

Plaintiff- Appellee

versus

**SUPREME COURT OF VIRGINIA:
DAVID B. BEACH**

Defendant-Appellant

AMERICAN CORPORATE COUNSEL ASSOCIATION

Amicus Curiae

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Chief District Judge. (CA-86-1130-A)

Argued: March 3, 1987

Decided: June 12, 1987

Before WINTER, Chief Judge, ERVIN, Circuit Judge, and YOUNG, United States District Judge for the District of Maryland, sitting by designation.

Gregory E. Lucyk, Assistant Attorney General (Mary Sue Terry, Attorney General of Virginia; Gail Starling Marshall, Deputy Attorney General; James T. Moore, III, Senior Assistant Attorney General on brief) for Appellants; Cornish F. Hitchcock (Alan B. Morrison, Public Citizen Litigation Group; Johh J. McLaughlin on brief) for Appellee.

CORRECTED OPINION/NEW COVER SHEET

WINTER, Chief Judge:

The Rules of the Supreme Court of Virginia permit some Virginia residents, but prevent nonresidents, from gaining admission to the Virginia bar on motion without having to take the bar examination. The district court ruled that this restriction violates the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution. The defendants appeal and we affirm.

I

Plaintiff Myrna E. Friedman is a member of the Illinois and the District of Columbia bars who currently resides in the state of Maryland and practices law exclusively in the state of Virginia. The plaintiff was admitted to the Illinois bar in 1977 and to the District of Columbia bar in 1980. In January of 1986, plaintiff became Associate General Counsel of ERC International, Inc., which is headquartered in Vienna, Virginia. When she took her position with ERC International, the plaintiff lived in Arlington, Virginia. Indeed, she had lived in Virginia when she practiced law in the District of Columbia. Before she filed her application for admission to the Virginia bar, however, the plaintiff got married and moved to her husband's home in Cheverly, Maryland. The plaintiff continues to work full-time at the corporate office in Virginia.

The plaintiff filed an application requesting admission to the Virginia bar without having to take the bar examination (admission on motion) in June of 1986. Her application was denied. Under the rules of the Virginia Supreme Court, the plaintiff was ineligible for admission to the Virginia bar on motion solely because she does not reside in Virginia. Subsequently, Ms. Friedman filed suit in the district court against the responsible state officials pursuant to 42 U.S.C. § 1983 to invalidate the provision of the Rules of the Virginia Supreme Court which disqualified her for admission to the

state bar on motion. After hearing arguments, the district court entered summary judgment for the plaintiff on the ground that the challenged provision of the Virginia rules violates the Privileges and Immunities Clause of the U.S. Constitution.

II.

Va. Code § 54-67 authorizes the Supreme Court of Virginia to adopt rules which admit experienced lawyers to the Virginia bar without taking the bar examination. The current rule in effect is Rule 1A:1 which provides that an applicant may be admitted on motion if he has been licensed for five years by a jurisdiction which admits Virginia bar members without examination and if he:

- (a) Is a proper person to practice law.
- (b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.
- (c) Has become a permanent resident of the Commonwealth.
- (d) Intends to practice full-time as a member of the Virginia Bar.¹

¹Rule 1A:1 in full provides:

Any person who has been admitted to practice law before the court of last resort of any state or territory of the United States or of the District of Columbia may file an application to be admitted to practice law in this Commonwealth without examination, if counsel licensed to practice here may be admitted to practice there without examination.

The applicant shall:

- (1) File with the clerk of the Supreme Court at Richmond an application, under oath, upon a form furnished by the clerk.

The Virginia Supreme Court interprets the full-time practice requirement of Rule 1A:1(d) to mean that an applicant must show that he intends to open an office in Virginia for the practice of law and to engage regularly in the practice of law in Virginia. *In Re Brown*, 213 Va. 282, 191 S.E.2d 812, 815 n. 3 (1972).

Virginia Rule 1A:1 has been challenged on federal constitutional grounds on at least two prior occasions. A due process challenge to the Virginia Rule was rejected in *Brown v. Supreme Court of Virginia*, 359 F. Supp. 549 (E.D. Va.), *aff'd mem.* 414 U.S. 1034 (1973). In addition, we have rebuffed a challenge to the full-time practice requirement of

(2) Furnish a certificate, signed by the presiding judge of the court of last resort of the jurisdiction in which he is entitled to practice law, stating that he has been so licensed for at least five years.

(3) Furnish a report of the National Conference of Bar Examiners concerning his past practice and record.

(4) Pay a filing fee of fifty dollars.

Thereafter, the Supreme Court will determine whether the applicant:

(a) Is a proper person to practice law.

(b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.

(c) Has become a permanent resident of the Commonwealth.

(d) Intends to practice full-time as a member of the Virginia bar.

In determination of these matters the Supreme Court may call upon the applicant to appear personally before a member of the Court or its executive secretary and furnish such information as may be required.

If all of the aforementioned matters are determined favorably for the applicant, he shall be notified that some member of the Virginia bar who is qualified to practice before the Supreme Court may make an oral motion in open court for his admission to practice law in this Commonwealth.

Upon the applicant's admission, he shall thereupon in open court take and subscribe to the oaths required of attorneys at law, whereupon he shall become an active member of the Virginia State Bar.

Rule 1A:1(d) under the Due Process and Commerce Clauses of the Constitution. *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859 (4 Cir. 1985). These cases establish that Virginia Rule 1A:1, taken as a whole, and the full-time practice requirement of Rule 1A:1(d) serve a legitimate state interest by ensuring that attorneys admitted to the bar are familiar with the laws of Virginia. *See also In Re Titus*, 213 Va. 289, 191 S.E.2d 798 (1972); *In Re Brown*, *supra*. No court, however, has addressed the issue presented in this case:

Does the residency requirement of Rule 1A:1(c), which limits admission without examination to Virginia residents, violate the Privileges and Immunities Clause of Article IV, § 2 of the Constitution. *See Goldfarb v. Supreme Court of Virginia*, 766 F.2d at 865 n. 7.

III.

Article IV, § 2 of the Constitution states that the "citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States." The district court, applying the test for prohibited discrimination against the citizens of the several states, found that Virginia Rule 1A:1 violated Article IV, § 2, relying principally on the Supreme court's recent decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

In *Piper*, the Court held that the practice of law is a privilege that is protected by Article IV, § 2 of the Constitution. 470 U.S. at 280-81. The practice of law, the court reasoned, is important to the national economy and is an important part of commercial intercourse between the states. *Id.* Moreover, out-of-state lawyers play an important role in protecting the wellbeing of a federal union by representing persons who raise unpopular federal claims. *Id.*, 470 U.S. at 281-82.

The district court held that Rule 1A:1(c) impermissibly burdens the privilege of practicing law in Virginia by requiring only nonresident attorneys who decide to practice full-time in Virginia to take a bar examination in order to qualify for the practice of law while some resident attorneys are afforded that privilege without having to take the examination. The state maintains that the district court misapplied *Piper* in reaching this conclusion because there is no fundamental right to practice law without taking a bar examination. *See* *Leis v. Flynt*, 439 U.S. 438 (1979). We find the state's argument unpersuasive.

The Privileges and Immunities Clause protects more than those rights which are considered fundamental individual rights protected by the Fourteenth Amendment. *Piper*, *supra*, 470 U.S. at 281 n.10; *Hicklin v. Orbeck*, 437 U.S. 518 (1978). In the modern view, Article IV, § 2 attempts to "fuse into one Nation a collective of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385 (1985).² Thus, the Court has found on many occasions that the Clause guarantees to the citizens of the nation that they may do business within a state on the same terms as the citizens of that

²The purpose of the Clause is stated in the provision of the Articles of Confederation from which the Article IV, § 2 of the Constitution was derived:

The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively.

Art. of Confed. art. IV, in 9 J. of Continental Congress 908 (W. Ford ed. 1906). The shorter version of this provision which was included in the Constitution was not intended to change the substantive meaning of the Clause. *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975).

state. *Id.* In doing so, the Court has extended the protection of the Privileges and Immunities Clause to a variety of economic interests which are not considered fundamental rights within the sphere of the Fourteenth Amendment. *See Hicklin v. Orbeck*, *supra* (invalidating job preferences for state residents); *Toomer v. Witsell*, *supra* (invalidating a license fee for shrimp boats operated by nonresidents); *Ward v. Maryland*, 12 Wall 418 (1871) (invalidating special fees to nonresidents for licenses to trade in goods not manufactured in Maryland).³ The Court has extended the protection of the Privileges and Immunities Clause to those rights which are 'fundamental' to the promotion of interstate harmony." *Piper*, *supra*, 470 U.S. at 279; *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 388 (1978). Indeed, in *Piper* the Court held that the practice of law was protected by § 2 of Article IV although the right to practice law has never been found to be a fundamental right. Thus, the Virginia rule in this case unquestionably burdens a privilege which is protected by Article IV, § 2.

The Virginia Rule is subject to scrutiny under Article IV, § 2 because the Rule has disproportionate impact on the practice of law by citizens of the several states who are not residents of Virginia. The effect on nonresidents is obvious because the state has chosen to distinguish between citizens of the state and noncitizens on the face of the enactment; the discriminatory effect of Rule 1A:1 falls entirely on nonresidents of Virginia.

³In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978), the Court held that the interest of nonresidents in the sport of elk hunting in a state does not fall within the purview of the Privileges and Immunities Clause because elk hunting is not an activity which is basic to the well-being of the union. 436 U.S. at 388. The decision distinguished the sport of elk hunting from the pursuit of "common callings within the state" for which the state may not place unreasonable burdens on nonresidents of the state. 436 U.S. at 383.

It is true that Rule 1A:1, taken as a whole, burdens many residents of Virginia as well as nonresidents. The Rule allows a person to enter practice on motion only if he has been a member of the bar of another state for five years. Residents of the state who begin their career by practicing in Virginia must take a bar examination; they may never be admitted to the bar on motion. In addition, the Rule also affects new residents who do not meet this five year continuous practice requirement. However, the provision precluding the plaintiff's admission on motion to the Virginia bar, the residency requirement of Rule 1A:1(c), applies on its face exclusively to nonresidents. While other provisions of the Rule — such as the full-time practice requirement or the requirement that an applicant for on-motion admission be a member of the bar of another state — may burden residents of Virginia, the effect of these provisions does not remove or detract from the facial disparity in the treatment of citizens and noncitizens by Rule 1A:1(c).

The requirement that nonresidents who are committed to practicing in the state of Virginia must take the bar examination certainly imposes a burden on the practice of law that justifies application of the scrutiny required by Article IV, § 2. Taking a bar examination requires the payment of a fee; it involves the time and expense of becoming acquainted with the state law through appropriate study materials or review courses; it results in a period of delay for successful applicants before they may be admitted to the bar which may have a serious, albeit temporary, effect on their legal practice; and, of course, the bar examination itself involves the risk that even an experienced attorney may fail. The rule imposes these burdens on nonresident citizens who are not represented in

the Virginia Assembly.⁴ The effect of Rule 1A:1(c) is to deter attorneys who are leaving their previous practice to practice in this region, and who plan to live in Washington or Maryland, from competing with members of the Virginia bar. The Rule also encourages persons who will practice law in Virginia to purchase a home in Virginia instead of elsewhere. Thus, the provision is arguably designed as a means of economic protectionism with the attendant adverse effect of disrupting interstate harmony.⁵ We find, therefore, that these burdens justify application of the traditional test for scrutinizing discrimination against the citizens of other states.

Virginia contends that this analysis is inapplicable because Rule 1A:1 does not absolutely prohibit the practice of law in Virginia by nonresidents. The Court, however, has closely scrutinized burdens imposed by a state such as license fees or hiring preferences under Article IV, § 2 even though such burdens are not wholesale restrictions on the privileges and immunities of citizens of the union. *Hicklin v. Orbeck*, *supra* (job preferences); *Toomer v. Witsell*, *supra* (license fee); *Ward v. Maryland*, *supra*, (fees). Under the

⁴Justice Stone pointed out the problem of state legislation which burdens persons who do not reside within the state in *South Carolina State Highway Department v. Barnwell Brothers*, 303 U.S. 177, 185 n.2 (1938):

When the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.

See, generally, J.N. Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L.J. 425 (1982).

⁵The Court in *Piper* noted that one reason that has been expressed for state rules raising barriers to admission to the bar by nonresident attorneys is to "erec[t] fences against out-of-state lawyers . . . to protect [in-state] lawyers from professional competition." 84 L.Ed.2d at 214 n.18 (quoting a former president of the American Bar Association).

state rule struck down in *Piper*, in fact, the plaintiff "was not excluded totally from the practice of law in New Hampshire." *Supra*, 470 U.S. 277 n. 2. Nonresident attorneys were authorized to appear before the state courts of the New Hampshire *pro hac vice*. However, this alternative, like a bar examination, burdened out-of-state lawyers by precluding them from practicing in New Hampshire on the same terms as a resident attorney. *Id.*

Defendants cite *Sestric v. Clark*, 765 F.2d 655 (7 Cir. 1985), *cert. denied*, _____ U.S. _____ (1986) as authority to support the validity of the challenged restriction. In that case, the Seventh circuit analyzed a provision of Illinois law which allowed new residents to become a member of the state bar on motion, but required nonresidents to take a bar examination. The court concluded that the Illinois rule affected old residents who were not eligible for admission on motion, and new residents who did not meet a continuous practice requirement, as well as nonresident applicants to the bar. 765 F.2d at 659-60. As a result, the court concluded that the statute raised no suspicion that it was an arbitrary limit on the privileges of nonresident citizens because the rule primarily affected resident citizens.

The Seventh Circuit also ruled that the Illinois rule involved no "net burden" to nonresident attorneys because applicants to the bar who moved to Illinois were likely to be giving up their previous practice in another state, while applicants who sought to maintain their residency in another state were more likely seeking to add to their current practice. Thus, resident attorneys escaped a bar examination but lost an established practice, while nonresident attorneys faced a bar examination but gained an additional area for their law practice. *Id.* Based on this assessment of the costs and benefits of the Illinois residency requirement, the court concluded that the plaintiff had failed to make out a prima facie case under the Privileges and Immunities Clause.

We need not consider the merits of the decision in *Sestric*, because the provision of Illinois law discussed their omitted Virginia's requirement that applicant intend to practice full-time in the state. The addition of this requirement alters the results of the Seventh Circuit's analysis. Rule 1A:1(c) requires the plaintiff to become a permanent resident of Virginia in order to qualify for admission on motion, over and above the requirement of the Rule that persons be committed to practicing full-time in Virginia. The provision exclusively burdens citizens of the several states who intend to practice law full-time within the confines of the state of Virginia, but who are not residents of Virginia. Seen in this light, Rule 1A:1(c) operates as a discrimination solely against nonresidents who are otherwise committed to practicing law in the state of Virginia.

Because the Virginia rule incorporates a requirement that attorneys be committed to practicing full-time within Virginia, the rule places a "net burden" on nonresidents instead of residents. The Seventh Circuit reasoned that nonresident applicants to the state bar were undoubtedly proposing to supplement their existing practice, but Virginia's rule requiring full-time practice within the state prevents the drawing of that inference here. The challenged provision of the Virginia rule requires attorneys who are moving their practice to Virginia to give up their previous practice and take the Virginia bar examination if they choose to reside across the state line. The rule thus places a significant burden on nonresident citizens without, as distinguished from Illinois, offering them the benefit of an interstate practice.

IV.

Based on the preceding analysis, this case involves a straightforward application of the two part test for scrutiny under Article IV, § 2. Under this test, discrimination against nonresidents is valid if: (1) there is a substantial reason for

the difference in treatment; and (2) the discrimination bears a substantial relationship to the state's objective. *Piper*, *supra*, 470 U.S. at 284; *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208 (1984). In deciding whether the discrimination bears a substantial relationship to the state's objective, we may consider the availability of less restrictive means to achieve that end. *Id.* See, e.g., *Toomer v. Witsell*, *supra*, 334 U.S. at 398-99.

We conclude that the Virginia Rule fails to survive the scrutiny which this test imposes. Virginia suggests two reasons to justify the different treatment which it accords to residents and nonresidents seeking admission on motion. First, Virginia argues that the requirement of a bar examination furthers the state goal of enhancing the quality of legal practitioners in the state. The Court in *Piper* unequivocally rejected this rationale insofar as it seeks to justify discrimination against nonresident attorneys.⁶

⁶In *Piper*, New Hampshire offered four justifications for its refusal to admit nonresidents to the bar, all of which were rejected as unreasonable justifications for such discrimination. The state in that case asserted that nonresident members would be less likely (1) to become familiar with local rules and procedures; (2) to behave ethically; (3) to be available for court proceedings; and (4) to do pro bono and other volunteer work in the state. 470 U.S. at 285.

The court found that there was no evidence to support the State's claim that nonresidents were less likely to acquaint themselves with local rules and procedures and found the prospect unlikely because of the attorney's interest in zealously protecting the interests of her client. *Id.* The Court rejected the State's second justification because there is no reason to believe that nonresident lawyers are less ethical than attorneys who are residents of New Hampshire. *Id.* The State's third justification was rejected in *Piper* because the Court reasoned that a high percentage of lawyers who take the bar examination would be committed to residing in places reasonably convenient to the state. In addition, less restrictive means were available to the State to protect its interests, such as requiring distant counsel to retain a local attorney in individual cases. *Id.* at 287. Finally, the Court rejected the suggestion that nonresident attorneys would be less likely to engage in pro bono work because most attorneys who would become members of the state bar would endeavor to perform their share of these services and because the less restrictive alternative of requiring such volunteer representation was available. *Id.*

Certainly we perceive no nexus between residence and lawyer competence and Virginia points to none.

Virginia also argues that the residency requirement facilitates compliance with the requirement that an attorney must intend to practice full-time in Virginia, as required by Rule 1A:1(d) because a resident of Virginia is more likely to comply with this commitment than a nonresident. Virginia has established no enforcement machinery to monitor compliance with its full-time practice requirement. Its argument thus boils down to the assertion that residents are more likely to honor their commitment to practice full-time in Virginia than are nonresidents. Virginia offers no evidence to support this argument, and its logic is tenuous. In agreement with the district court we do not think that it is more likely that a resident will be more truthful than a nonresident in stating his intention, or in carrying out his commitment, to practice full-time in Virginia. As a result, we think that this objective cannot survive scrutiny.

Thus, we conclude that the Virginia rule is overbroad because it penalizes nonresident attorneys even though they are not more likely than resident attorneys to be untruthful about their intention to practice full-time in Virginia. As the plaintiff suggests, a less restrictive alternative available to the state would be to require attorneys to renew each year their promise to practice full-time in Virginia. A rule requiring a renewed commitment to full-time practice would ensure that attorneys, the majority of whom do presumably subscribe to the basic canons of ethics, would be reminded of the commitment which they agreed to fulfill. This alternative would have the same beneficial effect on compliance with Virginia's full-time practice requirement as the current rule, without placing special burdens on the citizens of the several states.

Moreover, Virginia's requirement that applicants maintain an office in Virginia renders redundant the Rule's requirement that an applicant maintain a permanent residence in the state. If an office is to be maintained in

Virginia, it is likely that most nonresidents will live in places reasonably convenient to Virginia. In fact, the office requirement adopted by the Virginia Supreme Court facilitates compliance with the full-time practice requirement in nearly the identical manner as the residency requirement because it ensures that an attorney will maintain a tangible in-state presence and interest in the laws of the state which is roughly equivalent to the commitment that results from in-state residence. Thus, the requirement that an attorney maintain an office in the state achieves the very goal that is sought to be reached by the residency requirement of the current Rule; but, at the same time, the in-state office requirement does not subject citizens of the states neighboring Virginia to unfair discrimination. *Cf. Goldfarb v. Supreme Court of Virginia, supra*, 766 F.2d at 862-65 (full-time practice requirement of Virginia Rule 1A:1(d) does not constitute economic protectionism in violation of Commerce Clause). While it may be argued that reliance on the presence of an office in the state to enforce the full-time practice requirement would permit attorneys to evade the Rule by establishing a sham office in order to have a mailing address within Virginia, it is equally true that an attorney seeking to evade the current Rule may just as easily establish a sham residence within the confines of the state.

Finally, we agree with the plaintiff that Virginia could assure compliance with their full-time practice requirement if it were combined with a rule requiring annual renewals of an attorneys affidavit stating that he maintains an office in Virginia, in addition to practicing full-time within the state. This would be a far less drastic alternative than the current residency requirement.

The Plaintiff also contends that the Virginia Rule violates the Equal Protection Clause and the Commerce Clause. In view of our conclusion about the Privileges and Immunities Clause, we need not consider these issues.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

MYRNA E. FRIEDMAN,

v.

Plaintiff,

CIVIL ACTION NO.

86-1130-A

SUPREME COURT OF VIRGINIA,

et al.,

Defendants

ORDER

For the reasons stated from the bench, the court is of the opinion that the plaintiff's claims under the Commerce Clause and the Equal Protection Clause are without merit. However, the court finds that where the plaintiff agrees to practice full time as a member of the Virginia bar and has met the five year practice requirement in another state, the requirement of permanent residence bears no substantial relationship to the objectives advanced by the Commonwealth of Virginia, namely, proficiency in the practice of law, a commitment to that jurisdiction, and an assurance of compliance with the agreement to practice full time. The court therefore concluding that in this case the permanent residence requirement violates the Privileges and Immunities Clause, it is hereby ORDERED that:

1. The motion of the plaintiff for summary judgment is granted.
2. The motion of the defendants for summary judgment is denied.
3. It is DECLARED that the requirement of permanent residence in Rule 1A:1 of the Rules of the Supreme Court of Virginia under the circumstances of this case is invalid as violative of the Privileges and Immunities Clause of the United States Constitution.

Alexandria, Virginia
November 14th, 1986

s/Albert v. Bryan, Jr.
United States District Judge

APPENDIX C

Rule 1A:1. Foreign Attorneys—When Admitted to Practice in This State Without Examination.

Any person who has been admitted to practice law before the court of last resort of any state or territory of the United States or of the District of Columbia may file an application to be admitted to practice law in this Commonwealth without examination, if counsel licensed to practice here may be admitted to practice there without examination.

The applicant shall:

(1) File with the clerk of the Supreme Court at Richmond an application, under oath, upon a form furnished by the clerk.

(2) Furnish a certificate, signed by the presiding judge of the court of last resort of the jurisdiction in which he is entitled to practice law, stating that he has been so licensed for at least five years.

(3) Furnish a report of the National Conference of Bar Examiners concerning his past practice and record.

(4) Pay a filing fee of fifty dollars.

Thereafter, the Supreme Court will determine whether the applicant:

(a) Is a proper person to practice law.

(b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.

(c) Has become a permanent resident of the Commonwealth.

(d) Intends to practice full time as a member of the Virginia bar. In determination of these matters the Supreme Court may call upon the applicant to appear personally before a member of the Court or its executive secretary and furnish such information as may be required.

If all of the aforementioned matters are determined favorably for the applicant, he shall be notified that some member of the Virginia bar who is qualified to practice before the Supreme Court may make an oral motion in open court for his admission to practice law in this Commonwealth.

Upon the applicant's admission he shall thereupon in open court take and subscribe to the oaths required of attorneys at law, where upon he shall become an active member of the Virginia State Bar.

APPENDIX D

**UNITED STATES OF APPEALS
FOR THE FOURTH CIRCUIT**

NO. 86-3170

MYRNA E. FRIEDMAN,

Plaintiff/ Appellee

v.

**SUPREME COURT OF VIRGINIA;
DAVID B. BEACH,**

Defendants/ Appellants

AMERICAN CORPORATE COUNSEL ASSOCIATION,

Amicus Curiae.

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
VIRGINIA, ALEXANDRIA DIVISION**

NOTICE OF APPEAL

The Supreme Court of Virginia and its Clerk, David B. Beach, defendants/appellants, hereby appeal to the Supreme Court of the United States from the decision of the United States Court of Appeals for the Fourth Circuit, dated June 12, 1987, affirming the district court, and from the Court's denial

of appellants' Petition for Rehearing and Suggestion for Rehearing In Banc, dated July 21, 1987. Appeal is taken pursuant to 28 U.S.C. § 1254(2).

Respectfully submitted,

SUPREME COURT OF VIRGINIA, *et al.*

By: /s/ Gregory E. Lucyk

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing NOTICE OF APPEAL was mailed, postage prepaid, this 25th day of August, 1987, to Cornish F. Hitchcock, Esquire, Public Citizen Litigation Group, 2000 P St., N.W., Suite 700, Washington, D.C. 20036; John J. McLaughlin, Esquire, 313 Park Avenue, Suite 400, Falls Church, Virginia 22046, counsel for plaintiff; and Timothy C. Winslow, Esquire, American Corporate Counsel Association, 1225 Connecticut Avenue, N.W., Suite 202, Washington, D.C. 20036, counsel for amicus, the American Corporate Counsel Association.

No. 87-399

OCT 2 1987

JOSEPH F. SPANIEL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

SUPREME COURT OF VIRGINIA
and DAVID B. BEACH, Clerk,
Supreme Court of Virginia,
Appellants,

v.

MYRNA E. FRIEDMAN,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO AFFIRM

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October 1987

QUESTION PRESENTED

Did the court of appeals correctly hold that the Privileges and Immunities Clause prevents a state from waiving the bar examination requirement for experienced lawyers who live in that state, while denying that option to equally qualified lawyers solely because they live in another state?

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**IN THE
Supreme Court of the United States
OCTOBER TERM, 1987**

No. 87-399

SUPREME COURT OF VIRGINIA
and **DAVID B. BEACH**, Clerk,
Supreme Court of Virginia,
Appellants,

v.

MYRNA E. FRIEDMAN,
Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION TO AFFIRM

Appellee Myrna E. Friedman respectfully moves the Court to affirm the judgment because it is manifest that the question on which the decision of the case depends is so unsubstantial as not to need further argument. The opinion below is now reported at 822 F.2d 423 (4th Cir. 1987).

STATEMENT OF THE CASE

Rule 1A:1 of the Rules of the Supreme Court of Virginia allows experienced lawyers to be admitted to the Virginia bar without first taking the bar examination, a process which will be referred to here as "motion admissions" or "admission on motion." Under this Rule, an applicant must have been licensed for five years by a jurisdiction which admits Virginia bar members on motion, must be "a permanent resident of the Commonwealth," and must intend "to practice full time as a member of the Virginia bar." Va. S. Ct. R. 1A:1(c), (d).

Ms. Friedman is an experienced lawyer who in January 1986 became assistant general counsel of a corporation based in Fairfax County, Virginia. Her job entails advising her employer on Virginia law, and she may be required to represent the company in Virginia courts. She sought admission to the Virginia bar on motion in June 1986, but her application was denied solely because she lives in Cheverly, Maryland, and thus failed to meet the residency requirement of Rule 1A:1(c) (J.S. App. A2).

On 25 September 1986, Ms. Friedman filed suit against the Supreme Court of Virginia and its clerk ("Virginia" or the "appellants") in the United States District Court for the Eastern District of Virginia. She alleged that Rule 1A:1(c) discriminated against residents of other states, in violation of the Privileges and Immunities Clause, the Equal Protection Clause, and the Commerce Clause of the United States Constitution.

On 14 November 1986, the district court heard argument on cross-motions for summary judgment and ruled from the bench that Rule 1A:1(c) violated the Privileges and Immunities Clause. In a memorandum opinion filed that day, Chief Judge Bryan stated that when an ex-

perienced applicant agrees to practice full time as a member of the Virginia bar, a residence requirement "bears no substantial relationship to the objectives advanced by the Commonwealth of Virginia, namely, proficiency in the practice of law, a commitment to that jurisdiction, and an assurance of compliance with the agreement to practice full time" (J.S. App. A15).

The Fourth Circuit affirmed on 12 June 1987 (J.S. App. A1-A14). The court rejected Virginia's threshold claim that the Privileges and Immunities Clause was inapplicable because nonresidents were not totally excluded from the Virginia bar, since they could always take the bar examination. As the court observed, the Rule on its face makes a distinction between residents and nonresidents, and the "discriminatory effect of Rule 1A:1 falls entirely on nonresidents of Virginia" (J.S. App. A7).

The court of appeals then held that the district court had correctly applied this Court's Privileges and Immunities Clause decisions in striking down the Rule. It found "no nexus between residence and lawyer competence and Virginia points to none" (J.S. App. A13). Nor did it find any reason to think that nonresidents would honor their commitment to full-time practice any less than Virginia residents would, adding that compliance with the Rule's full-time practice requirement could be assured through less restrictive means, such as requiring motion admittees to certify annually that they comply with that rule (J.S. App. A11-A14). Rehearing was denied, and no judge requested a vote on appellants' suggestion that the case be reheard *en banc*.

ARGUMENT

THE QUESTION PRESENTED IS NOT SUBSTANTIAL.

Because the courts below correctly set aside Rule 1A:1(c) as unconstitutional discrimination, plenary review is not warranted.

1. The judgment should be summarily affirmed because this case is controlled by *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which held that the Privileges and Immunities Clause prevents a state from discriminating against nonresidents seeking admission to its bar. Appellants argue (at 6-9) that *Piper* is not controlling because Ms. Piper had taken the bar examination, whereas Ms. Friedman is seeking admission on motion, but that distinction is not tenable.

The argument that the Privileges and Immunities Clause does not apply is based on the fact that nonresidents are not totally barred from obtaining a license in Virginia because they can take the bar examination. This claim is plainly foreclosed by the Court's decisions in this area, many of which involved laws which did not flatly bar nonresidents from pursuing their profession, but rather subjected them to conditions not applied to state residents. *E.g.*, *Mullaney v. Anderson*, 342 U.S. 415 (1952) (higher license fees); *Toomer v. Witsell*, 334 U.S. 385 (1948) (same); *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871) (permit requirements).

Rule 1A:1 offers Virginia residents a valuable benefit in the form of a "fast-track," almost risk-free way of obtaining a license without taking time away from their practice. By contrast, as the court of appeals noted, nonresidents must take the time and incur the expenses of preparing for and taking the bar examination; their admission is delayed

until after they pass that examination, "which may have a serious, albeit temporary, effect on their legal practice"; and they assume the "risk that even an experienced attorney may fail" the examination (J.S. App. A8). Because the benefits of Rule 1A:1 are offered *only* to Virginia residents, the Rule is precisely the sort of state law requiring scrutiny under the Privileges and Immunities Clause, which was intended to cure "the practice of some States denying to outlanders treatment that its citizens demanded for themselves." *Austin v. New Hampshire*, 420 U.S. 656, 660-61 (1975).

Appellants seem to be arguing that since they could make everyone take the bar examination, they enjoy total discretion to decide when and for whom that requirement will be waived. The point is answered by this Court's decisions involving unconstitutional conditions, such as *Speiser v. Randall*, 357 U.S. 513 (1957), of which the Court later said: "While the State was surely under no obligation to afford such an exemption, we held [in *Speiser*] that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of [constitutionally protected rights] and thereby threatened to produce a result which the State could not command directly." *Sherbert v. Verner*, 374 U.S. 398, 405 (1963). *Piper* makes it clear that Virginia may not exclude nonresidents from its bar, nor may it penalize them *vis-a-vis* equally qualified residents by making them take a bar examination.¹

¹ In *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859 (4th Cir. 1985), the court of appeals upheld dismissal of a complaint which challenged Rule 1A:1(d)'s full-time practice requirement under the Commerce Clause. The court reasoned that if Virginia could make everyone take a bar examination, it was free to waive that requirement for some people, but not others, and the court brushed aside without explanation the plaintiff's argument that the full-time practice rule

Virginia also relies (at 7-8) on *Frazier v. Heebe*, 107 S. Ct. 2607 (1987), which invalidated a residence/office requirement for admission to a federal district court bar. Ignoring the outcome of that case, appellants seize upon the Court's observation that the nonresidents being excluded there had "passed the Louisiana bar exam" and suggest that this fact was crucial to the result. *Id.* at 2612. Although the rule at issue in *Frazier* required members of the district court bar to be members of the Louisiana state bar, and there was no procedure for being admitted to the Louisiana bar on motion, nothing in *Frazier* suggests that the analysis or result would have been different if lawyers could have been admitted to the Louisiana bar on motion.

If anything, *Frazier* bolsters the case for summary affirmance, as the Court held that in-state residence and office requirements were "unnecessary and irrational" ways of achieving the district court's goal of a competent and responsible bar. *Id.* at 2612. Since those are the same goals which the residence requirement is said to advance here, and since the Court has already rejected these arguments in *Piper* and *Frazier*, there is no need to give them plenary consideration once again.

was an unconstitutional condition. This Court denied certiorari, with Justice White and Justice Blackmun voting to hear the case. 106 S. Ct. 862 (1986).

Here, Virginia defends the residence requirement as a way of assuring compliance with its full-time practice rule. Should the Court note probable jurisdiction, appellee will argue that the residence requirement is an unconstitutional condition under *Speiser*. That contention, if upheld, would also undermine the validity of the full-time practice rule (which we note is the most restrictive requirement imposed by any state admitting attorneys on motion). Compare, e.g., Ill. S. Ct. R. 705; Ind. Rules for Admission to the Bar and the Discipline of Attys., R. 6; Iowa Code Ann. § 610 App., R. 114(a); Ohio S. Ct. Rules for the Gov't of the Bar of Ohio, R. I, § 9(g); K.I.S. Ct. R. 34(d); Wyo. Stat. § 33-5-110.

2. Appellants next argue (at 9-11) that the decision below creates a conflict between the circuits. It does not. The decision is consistent with virtually every lower court opinion to address this issue.² The only contrary opinion — and there is really just one — is both wrong on the law and factually distinguishable.

In *Sestric v. Clark*, 765 F.2d 655 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 862 (1986), the court held that the Privileges and Immunities Clause does not apply to an Illinois court rule which limited admission on motion to Illinois residents, adding in *dictum* that even if the Clause did apply, the restriction was a valid way to promote lawyer competence. *Sestric* was relied on in the other case which Virginia cites, a district court opinion upholding a Wyoming law which limited motion admissions to lawyers who have lived in the state for six months. *Sommermeier v. Supreme Court of Wyoming*, 659 F. Supp. 207 (D. Wyo. 1987), *appeal pending*, No. 87-1811 (10th Cir.) (awaiting argument).

Sestric assumed that Illinois' rule benefited only "new" Illinois residents, while denying motion admission to "old" Illinois residents and all nonresidents, and it reasoned that since the burden fell on both residents and nonresidents alike, the Privileges and Immunities Clause did not apply. 765 F.2d at 659. Since Rule 1A:1 does not limit motion admissions to "new" Virginia residents, and since the discriminatory effect of this Rule is aimed at nonresidents, there

² See *In re Jadd*, 391 Mass. 227, 237, 461 N.E.2d 760, 765-66 (1984); *Gordon v. Committee on Character and Fitness*, 48 N.Y.2d 266, 273, 397 N.E.2d 1309, 1313, 422 N.Y.S.2d 641, 645 (1979) (*dictum*); see also *Stanley v. Missouri State Board of Law Examiners*, 616 F. Supp. 142 (W.D. Mo. 1985); *Solomon v. Emanuelson*, 586 F. Supp. 280, 285 (D. Conn. 1984); *Stalland v. South Dakota Board of Bar Examiners*, 530 F. Supp. 155 (D.S.D. 1982).

is no conflict between this case and *Sestric*. Moreover, this Court has held that the Privileges and Immunities Clause is not limited to laws that discriminate solely against nonresidents, but applies to state laws favoring one category of residents over both other residents and nonresidents. See *United Building & Construction Trades Council v. Mayor & Council of the City of Camden*, 465 U.S. 208, 218 (1984). Thus, even if *Sestric* were not distinguishable, it is plainly in error, and there is no reason to grant review based on an asserted conflict with it.

Nor is there a need for plenary review of the merits. Virginia argues that residence helps assure lawyer competence and a willingness to honor professional commitments, but those claims were laid to rest in *Piper* and *Frazier* and need not be revisited here. If the Court is concerned that the outcome here differs from that in *Sestric* — and that seems to be the crux of appellants' final argument (J.S. at 11-14) — there is a further distinction which the court of appeals considered pivotal (J.S. App. A10-A11) and which requires this case to be affirmed summarily.

Both Illinois and Virginia expressed concern that non-resident motion admittees would be less committed to practicing law in their states than residents, particularly if they divided their practice between their home state and the state where they were admitted on motion. After *Piper* and *Frazier*, there are serious questions about whether the multi-state practice of law is the sort of "evil" which the Constitution allows a state to restrict in this manner. See note 1, *supra*. In any event, Virginia, unlike Illinois, has addressed that concern by requiring motion applicants "to practice full time as a member of the Virginia Bar" for as long as they wish to remain a member in good standing of the Virginia Bar. Va. S. Ct. R. 1A:1(d), 1A:3. Ms. Friedman has made that commitment to full-time practice here,

while the lawyer in *Sestric* wanted to practice in both Missouri and Illinois and could have done so had the Illinois residency requirement been struck down. 765 F.2d at 660.

The court of appeals here thought this point was crucial: "The Seventh Circuit reasoned that nonresident applicants to the state bar were undoubtedly proposing to supplement their existing practice, but Virginia's rule requiring full-time practice within the state prevents the drawing of that inference here," for it asks motion applicants to "give up their previous practice" *and* to live in Virginia, thus placing "a significant burden on nonresident citizens without, as distinguished from Illinois, offering them the benefit of an interstate practice" (J.S. App. A11).

When viewed in conjunction with this full-time practice rule, Virginia's residency requirement is indeed redundant. While appellants argue that living in Virginia helps assure that motion applicants will honor their commitment to full-time practice, the court of appeals correctly found it unlikely that "a resident will be more truthful than a non-resident in stating his intention, or in carrying out his commitment, to practice full-time in Virginia" (J.S. App. A13). Nor does the decision below undermine enforcement of that rule. The court of appeals noted that "Virginia has established no enforcement machinery to monitor compliance" and add 1 that compliance could be assured through a "less drastic alternative," such as requiring motion admittees to certify annually that they have practiced full-time in Virginia over the past year (J.S. App. A13, A14).

Finally, we note that Virginia's full-time practice rule is unique among the seven states which require residency of motion applicants. See note 1, *supra*. Indiana, Ohio and Wyoming simply require motion applicants to be state re-

sidents, while Iowa gives them the option of living in the state or showing a bona fide intention to open a law office there. Illinois demands an "active[] and continuous[]" in-state practice, while Rhode Island requires motion applicants to make law practice in that state their "principal occupation." Only Virginia asks motion applicants to commit themselves to "full-time" practice. Thus, a ruling on the merits will be of limited precedential value, and for that reason also, summary affirmance is warranted.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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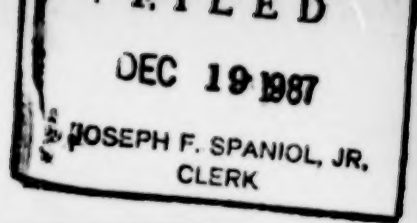
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October 1987

No. 87-399



**In The Supreme Court
Of The United States**

October Term, 1987

Supreme Court of Virginia,

Appellant,

v.

Myrna E. Friedman,

Appellee.

**On Appeal from the United States Court
Of Appeals for the Fourth Circuit**

**BRIEF OF THE STATES OF WYOMING, ILLINOIS,
IOWA AND OHIO
AS AMICI CURIAE
IN SUPPORT OF APPELLANT**

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QUESTION PRESENTED

The question before the Court is whether the requirement of the Supreme Court of the Commonwealth of Virginia that applicants requesting admission by reciprocity be residents of Virginia violates the Privileges and Immunities Clause of the United States Constitution, Article IV, §2, cl.1.

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**BRIEF OF THE STATES OF WYOMING, ILLINOIS,
IOWA AND OHIO
AS AMICI CURIAE
IN SUPPORT OF APPELLANT**

INTEREST OF AMICI CURIAE

The brief is filed on behalf of the States of Wyoming, Illinois, Iowa, and Ohio and is sponsored by the Attorney General of Wyoming as authorized by Supreme Court Rule 36.4. The Amici support the brief submitted by the Appellant and urge this Court to reverse the decision of the Fourth Circuit Court of Appeals.

Like Virginia, the Amici states require nonresidents wishing to practice law to pass a bar examination. An attorney who has practiced for at least five years in another jurisdiction may be admitted without examination if he becomes a bona fide resident of the state. Therefore, a decision by this Court that negates the residency requirement for admission without examination will significantly

affect the manner in which the Amici states admit attorneys to practice and the manner in which they supervise those attorneys.

The states of Illinois and Wyoming have a special interest in the outcome of this matter because federal courts have validated their residency requirements for admission without examination. See, *Sestric v. Clark*, 765 F.2d 655 (7th Cir. 1985), *cert. den.* 474 U.S. 1086 (1986), and *Sommermeier v. Supreme Court of Wyoming, et al.*, 659 F. Supp. 207 (D. Wyo. 1987), *appeal docketed*, No. 87-1811 (10th Cir. June 2, 1987).

SUMMARY OF ARGUMENT

A decision that reciprocity cannot be conditioned on bona fide residency will dilute the powers of the states to govern the practice of law within their borders. This Court should only strike down bar admission regulations which violate constitutional rights; because one does not have a fundamental right to avoid taking a bar examination, this Court should uphold Virginia's regulation. The rule has a rational relationship to a state's compelling interest to regulate the practice of law.

By permitting experienced attorneys to become admitted without examination, rather than requiring everyone to take a bar examination, Virginia facilitates interstate mobility of attorneys and contributes to the creation of a national economic union. A ruling which denies to states the privilege of allowing new residents to join the bar on motion could result in states abolishing reciprocity and conditioning admission on examination.

ARGUMENT¹

I

A DECISION THAT RULE 1A:1 OF THE VIRGINIA SUPREME COURT VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE WILL UNNECESSARILY INTERFERE WITH ITS ABILITY TO REGULATE THE PRACTICE OF LAW.

This Court has long recognized that states possess sovereign powers to regulate the practice of law. "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the state." *Leis v. Flynt*, 439 U.S. 438, 442 (1979). States have a compelling interest in establishing licensing standards for the practice of professions within their borders. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). States can require high standards of competency, including proficiency in the law and character. However, a state cannot impose admission standards which violate an applicant's constitutional rights, which have no rational relationship to the state's interests or which are arbitrary. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

An application of the *Schwartz* test reveals that the Virginia residency requirement is within permissible bounds. First, the requirement does not violate the Privileges and Immunities Clause, Article IV, §2, cl. 1, U.S. Constitution. The facts of this case differ significantly from several recent U.S. Supreme Court cases which have found a constitutional infirmity in states' regulation of the activi-

¹The Appellant has thoroughly and effectively presented the argument that the requirement of residency does not violate the Privileges and Immunities Clause of the United States Constitution. Consequently, to avoid repetition, the Amici will limit its discussion to the importance of the Rule in state regulation of bar activities and the effect of a ruling which vitiates the residency requirement.

ties of nonresidents. While this court is asked by Appellee to expand the holding of *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), there are significant differences which make the holding of *Piper* inapposite. There, the New Hampshire Supreme Court had promulgated a rule which denied nonresidents the opportunity to practice law within the state. In the instant case, any nonresident who passes the Virginia bar examination will be permitted to practice within the state. Nor does Virginia's rule smack of the discriminatory practices struck down in *Hicklin v. Orbeck*, 437 U.S. 518 (1978), and *United Building & Construction Trades Council v. Mayor & Council of City of Camden*, 465 U.S. 208 (1984), both of which involved efforts to foreclose economic competition of nonresidents. Finally, the regulation does not represent the kind of "arbitrary discrimination" found in *Frazier v. Heete*, — U.S. —, 107 S. Ct. 2607, 96 LEd 2d 557 (1987), wherein an attorney who had passed the Louisiana bar exam was prohibited from practicing in a federal district court of the state because he did not have an office located in the district.

An application of the *Schwartz* test also reveals that Virginia's regulation has a rational relationship to the state's compelling interest to regulate the practice of law. The primary justifications for requiring residency reflect a sincere attempt to assure that attorneys are competent. One practicing in a state should be familiar with local rules of practice and the uniqueness of the admitting state's substantive law. Furthermore, such an approach prevents or discourages back door admissions; one cannot circumvent high original admission standards of one state by taking a bar examination in another state whose standards for admission are not so exacting.

These reasons for requiring residency are solid ones, designed to further reasonable state expectations, and are not feeble examples of rationalization to justify the residency requirement. If a nonresident attorney has not taken

the bar exam in the state in which he will be practicing, it is likely that he is not competent to practice in the state because he will not be familiar with the law of the state. However, if he moves into the state, it must be assumed that he intends to learn the laws of the state, because most of his clients will be citizens of that state and most of his cases will be focused on the law of the state. As was observed by Justice Rehnquist in his dissent in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 291 (1985), "law is one occupation that does not readily translate across state lines."

There are other obvious reasons a state has significant interests in encouraging attorneys to be residents. Some of these reasons are set out in Justice Rehnquist's dissent in *Piper*. They include the state's interest in enlarging the number of attorneys who some day could be involved in legislative activities; the state's interest in seeing that lawyers be knowledgeable about local concerns which in turn can be translated into state policies; and the state's interest in seeing that attorneys become more actively involved in government, charitable and community affairs. These interests can only be fulfilled by resident attorneys. As Justice Rehnquist aptly stated:

...the point is that New Hampshire is entitled to believe and hope that its lawyers will provide the various unique services mentioned above, just as it is entitled to believe that the residency requirement is the appropriate way to that end. *Id.* at 294.

There are other justifications for a residency requirement. A bar with a local membership creates the professional and social pressures necessary to maintain discipline. Further, local lawyers have a stake in the community. They thus have more of a "vested interest" to see that high professional standards are maintained. The community also

properly expects that lawyers know local customs and procedures.

Conditioning admission to the bar of Virginia without examination serves valid state interests which should be sustained. Residency requirements bear a rational relationship to all the permissible goals delineated in this argument.

II

ARULING ADVERSE TO THE COMMONWEALTH OF VIRGINIA COULD RESTRICT, RATHER THAN ENHANCE, THE INTERSTATE PRACTICE OF LAW.

The recognized purpose of the Privileges and Immunities Clause, Article IV, §2, cl. 1, U.S. Constitution, is to eliminate protectionist burdens imposed by states on nonresidents and to prevent the furtherance of parochial interests. However, a ruling that Virginia can no longer require residency as a condition precedent of admission could result in states abolishing their reciprocity provisions. If residency requirements for reciprocity are negated, states will have to decide whether to end the privilege of admitting lawyers on motion or stand willing to admit all lawyers in the country.

It is clear that states have the power to require that all attorneys pass a state's bar examination to practice in that state's courts. *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 863 (4th Cir. 1985), *cert. den.* 474 U.S. 1086 (1986). The end result of the abolition of Virginia's residency requirement for reciprocity may very well be a mandatory bar examination for all.

The policy of Virginia to admit nonresident attorneys on motion actually facilitates interstate mobility of attorneys. Ironically, it is this generous attempt to encourage the movement of attorneys which has exposed Virginia to

the charge of violating the Privileges and Immunities Clause.

CONCLUSION

The Privileges and Immunities Clause of the United States Constitution is designed to create a national economic union. A state should not be permitted to discriminate against nonresidents for the benefit of its residents. However, the Virginia Rule does not violate the Appellee's constitutionally protected rights. Virginia has promoted legitimate state interests by ensuring the integrity and competency of persons who practice law within its boundaries through the promulgation of Virginia Supreme Court Rule 1A:1.

The judgment of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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December 1987

No. 87-399

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In The
Supreme Court of the United States

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its Clerk, DAVID B. BEACH,

Appellants,

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ON APPEAL FROM THE UNITED STATES
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<p>The following opinions, judgments and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Jur- isdictional Statement* :</p>	
Order of the United States District Court for the Eastern District of Virginia, dated November 14, 1986	J.S.A. A-15
Opinion of the United States Court of Appeals for the Fourth Circuit, dated June 12, 1987 ..	J.S.A. A- 1
Notice of Appeal to the Supreme Court of the United States	J.S.A. A-17

*Hereafter referred to as "J.S.A. A——."

RELEVANT DOCKET ENTRIES

Sept. 25, 1986 Plaintiff's Complaint

Oct. 24, 1986 Defendants' Motion for Summary Judgment

Oct. 24, 1986 Plaintiff's Motion for Summary Judgment

Nov. 14, 1986 Hearing on Cross-Motions for Summary Judgment

Nov. 14, 1986 Order of Federal District Court Granting Plaintiff's Motion for Summary Judgment and entering Judgment for Plaintiff

Dec. 12, 1986 Defendant's Notice of Appeal to the Fourth Circuit Court of Appeals

Dec. 19, 1986 Order of Federal District Court Staying Judgment Pending Appeal

June 12, 1987 Opinion of Fourth Circuit Court of Appeals Affirming Federal District Court Judgment for Plaintiff

June 26, 1987 Appellant Supreme Court of Virginia's Petition for Rehearing and Suggestion for Rehearing In Banc

July 21, 1987 Order of Fourth Circuit Court of Appeals Denying Appellant's Petition for Rehearing and Suggestion for Rehearing In Banc

July 31, 1987 Order of Fourth Circuit Court of Appeals Staying Mandate Pending Appeal to the Supreme Court of the United States

Sept. 4, 1987 Jurisdictional Statement filed by Appellant Supreme Court of Virginia

Nov. 2, 1987 Supreme Court of the United States notes Probable Jurisdiction

6432 Forest Road
Cheverly, Maryland 20785
(301) 773-2385,

Plaintiff,

V.

Civil Action No.
86-1130-A

SUPREME COURT OF VIRGINIA

and

**DAVID B. BEACH, Clerk,
Supreme Court of Virginia
Supreme Court Building
Richmond, Virginia 23219,**

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action challenges the constitutionality of Rules 1A:1(4)(c) and 1A:3 of the Supreme Court of Virginia insofar as they require qualified attorneys who seek admission to the Virginia bar without examination to be permanent residents of Virginia. The plaintiff is employed full-time as an attorney with a corporation in Virginia, and she would be eligible for admission without examination, but for the fact that she lives in Maryland. She seeks declaratory and injunctive relief on the ground that this in-state residency requirement violates the Privileges and Immunities Clause, the Equal Protection Clause of the Fourteenth Amendment, and the Commerce Clause of the United States Constitution, as well as 42 U.S.C. § 1983.

2. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(3) and (4).

Parties

3. Plaintiff Myrna E. Friedman was admitted to the Illinois bar in 1977 and to the District of Columbia bar in 1980. She is currently Associate General Counsel of ERC International Inc., a Delaware corporation headquartered in Vienna, Virginia, with six subsidiaries incorporated and located in Virginia. She lived in Virginia from August 1977 until February 1986, when she married and moved to Maryland, where she resides with her husband.

4. Defendant Supreme Court of Virginia is empowered by Virginia Code § 54-67 to admit attorneys to the Virginia bar without examination if they have practiced law in another jurisdiction for at least three years.

5. Defendant David B. Beach is the clerk of the Supreme Court of Virginia, and his duties include processing applications for admission to the Virginia bar without examination and issuing certificates to practice law to successful applicants. He is sued solely in his official capacity.

Facts

6. Pursuant to Virginia Code § 54-67, defendant Supreme Court of Virginia has promulgated and currently administers rules allowing attorneys who have been licensed for at least five years by another jurisdiction to be admitted to the Virginia bar without examination and to practice law in Virginia.

7. Rule 1A:1 of the Rules of the Supreme Court of Virginia sets forth the procedures and requirements for gaining admission to the Virginia bar without examination. Clause (c) of that Rule specifies that, in order to be admitted in this manner, an applicant must be a "permanent resident of the Commonwealth."

8. Defendant Supreme Court of Virginia has also adopt and enforces Rule 1A:3, under which it may revoke the certificate of any attorney admitted to the Virginia bar without examination following receipt of evidence that the attorney is no longer a permanent resident of Virginia.

9. On 5 June 1986 plaintiff submitted to the Supreme Court of Virginia a properly completed application for admission to the Virginia bar without examination. In a letter accompanying her application she stated that she had previously worked as a lawyer for the United States Navy in Arlington, Virginia, then for a company located in the District of Columbia, and, since January 1986, for her current employer in Virginia. She stated that she had lived in Virginia from August 1977 until early 1986, when she got married and moved to her husband's home in Maryland. She added that she intended "to continue working full-time as an attorney for ERC International Inc. in Virginia."

10. By letter dated 17 June 1986 defendant Beach informed plaintiff that her application had been rejected, noting that "the Court interprets your letter of June 5, 1986 to be a statement that you are not a permanent resident of the Commonwealth of Virginia. Thus, you are not

eligible for admission to the Virginia Bar by reciprocity," citing Rule 1A:1(4)(c).

11. Plaintiff wishes to be admitted to the Virginia bar so that she can practice law in Virginia courts and otherwise advise and represent her employer and its subsidiaries on a range of legal issues.

12. But for the fact that plaintiff resides in Maryland, she is otherwise eligible for admission to the Virginia bar without examination.

Causes of Action

13. Defendants' refusal to admit plaintiff to the Virginia bar without examination because she is not a permanent resident of Virginia violates:

(a) the Privileges and Immunities Clause of the United States Constitution (Article IV, Section 2);

(b) the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

(c) the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3); and

(d) 42 U.S.C. § 1983.

Prayer for Relief

Wherefore, plaintiff prays that this Court:

(1) declare unconstitutional the requirement of permanent residence in Virginia which is contained in Rules 1A:1(4)(c) and 1A:3 of the Rules of the Supreme Court of Virginia;

Dated: Washington, D.C.
25 September 1986

Attorney for Defendants

/s/ Cornish F. Hitchcock
 Cornish F. Hitchcock
 Public Citizen Litigation
 Group
 2000 P St., NW, Suite 700
 Washington, DC 20036
 (202) 785-3704

/s/ John J. McLaughlin
 John J. McLaughlin
 313 Park Avenue, Suite 400
 Falls Church, VA 22046
 (703) 237-0125
 Attorneys for Plaintiff

SO ORDERED: /s/ Albert V. Bryan, Jr.
 United States District Judge

Dated: October 22d, 1986

UNITED STATES DISTRICT COURT
 EASTERN DISTRICT OF VIRGINIA
 Alexandria Division

MYRNA E. FRIEDMAN,)	
)	
Plaintiff,)	
	)	Civil Action No.
v.	)	86-1130-A
)	
SUPREME COURT OF	)	(Filed October 24,
VIRGINIA, <i>et al.</i>,	)	1986)
)	
Defendants.)	

DEFENDANTS' MOTION FOR SUMMARY
 JUDGMENT

Come now the defendants, the Supreme Court of Virginia, and its Clerk, the Honorable David B. Beach, by counsel, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, move this Honorable Court to grant summary judgment in their favor and against plaintiff. A Memorandum of Law in support of this motion is attached hereto.

SUPREME COURT OF VIRGINIA,
et al

By: /s/ Gregory E. Lucyk
 Counsel

Mary Sue Terry
 Attorney General of Virginia
 James T. Moore, III
 Senior Assistant Attorney General
 Gregory E. Lucyk
 Assistant Attorney General
 Office of the Attorney General
 Supreme Court Building
 101 North 8th Street
 Richmond, Virginia 23219
 (804) 786-7584

(Certificate of Service Omitted)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MYRNA E. FRIEDMAN,)	
)	
Plaintiff,)	
	)	Civil Action No.
v.	)	86-1130-A
)	
SUPREME COURT OF	)	(Filed October 23,
VIRGINIA, <i>et al.</i>,	)	1986)
)	
Defendants.)	

NOTICE OF MOTION

PLEASE TAKE NOTICE that at 10:00 A.M. on Friday, the 14th day of November, 1986, plaintiff Myrna E. Friedman will move the United States District Court for the Eastern District of Virginia, sitting at 200 South Washington Street in Alexandria, to grant summary judgment in her favor pursuant to Rule 56, Federal Rules of Civil Procedure. No material facts are in dispute, and she is entitled to judgment as a matter of law. In support of her motion, plaintiff submits an affidavit with exhibits and a memorandum of points and authorities.

Respectfully submitted,

/s/ John J. McLaughlin
313 Park Avenue, Suite 400
Falls Church, VA 22046
(703) 237-0125

/s/ Cornish F. Hitchcock
Alan B. Morrison
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorneys for Plaintiff

22 October 1986

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MYRNA E. FRIEDMAN,)	
)	
Plaintiff,)	
	)	Civil Action No.
v.	)	86-1130-A
)	
SUPREME COURT OF	)	(Filed December
VIRGINIA, <i>et al.</i>,	)	16, 1986)
)	
Defendants.)	

Friday, November 14, 1986

Alexandria, Virginia

Transcript of Cross Motions for Summary Judgment
in the above-captioned matter.

BEFORE:

The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:

FOR THE PLAINTIFF:

JOHN J. McLAUGHLIN, ESQUIRE
313 Park Avenue—Suite 400
Falls Church, Virginia 22046

C. F. (Con) HITCHCOCK, ESQUIRE
Public Citizen Litigation Group
2000 P Street, N.W., Suite 700
Washington, D. C. 20036

* * *

DON McCOY, RPR
OFFICIAL COURT REPORTER
683-3668

FOR THE DEFENDANTS:

GREGORY E. LUCYK, ESQUIRE
 ASSISTANT ATTORNEY GENERAL
 Supreme Court Building
 101 N. 8th Street
 Richmond, Virginia 23220

* * *

(p. 39) in the commerce clause cases, where the issue is whether you are fencing people out entirely. The question is, are you giving your residents a benefit which you are not extending to nonresidents regardless of whether you have to offer it. The Tangier Sound (phonetic) fishing case in this Court, there is no obligation under the privileges and immunities clause to let people engage in commercial fishing for the type of fish being issued there. But once you do it you cannot discriminate.

We have discussed Sestrick more fully in the brief. If the Court has no further questions we will rely on the papers and the argument.

Thank you.

THE COURT: As I indicated earlier, I don't think that the plaintiff makes out a case either under the equal protection clause or the commerce clause. I think the latter is governed by the more recent Goldfarb case, and I think equal protection has probably been laid to rest as early as the Brown three judge court.

I do think she makes out a case under the privileges and immunities clause, however.

I do not think there is any substantial relation, and I think that is the test, between residence in this case and

the proficiency and commitment that the defendants seek to interpose as their justification for the rule.

(p. 40) Here the plaintiff has made the commitment to practice full time in the State of Virginia. Her only—the only difference between her and others who make such a commitment is residence, and concededly that where the State adopts a substitute for a Bar examination as the requirement for practice in the State, they are given a substantial discretion and leeway. Nevertheless, where residency is imposed, and that is the only difference here, that would have to bear some substantial relation, either to, or both to the ends sought to be accomplished, and that is a commitment to the jurisdiction and proficiency. Now the proficiency really can't be enhanced by residency. I don't gather that the defendants argue otherwise.

Commitment to the jurisdiction, it seems to me, can't be enhanced by residency unless you assume that the commitment she has made of agreeing to practice full time in Virginia is not going to be complied with; and I have no reason to think, and it hasn't been established on this record certainly, that nonresidents are less likely to live up to their commitments than residents. Nor do I think that there is any connection with compliance with the full-time commitment that is ensured by residency.

Again, you would have to reach the conclusion or find that that compliance is less likely to occur in the case of nonresidents than residents. That, as I indicated, is a (p. 41) provincialism we cannot indulge.

For these reasons, under the circumstances of this case, where the plaintiff has made the commitment to prac-

tice full time in Virginia, her requirement of, or the requirement of residence bears no substantial relation to any legitimate function of the State or commitment of the State or endeavor of the State. The rule runs afoul of the privileges and immunities clause, and is thus invalid.

I will prepare the order so declaring.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MYRNA E. FRIEDMAN,

Plaintiff,

v.

CIVIL ACTION
NO. 86-1130-A

SUPREME COURT OF VIRGINIA, *et al.*,

Defendants.

MOTION FOR STAY OF JUDGMENT
PENDING APPEAL

Now come the defendants, the SUPREME COURT OF VIRGINIA, and its Clerk, DAVID B. BEACH, by counsel, and pursuant to Fed. R. Civ. P. 62, move this Court for an order staying enforcement of the order entered by this Court on November 14, 1986, granting plaintiff's motion for summary judgment and declaring invalid the residency requirement of Rule 1A:1 of the Rules of the Supreme Court of Virginia, pending disposition of defendants' appeal to the United States Court of Appeals for the Fourth Circuit.

The reasons for granting the requested stay are stated with particularity in the Memorandum of Law attached hereto.

Respectfully submitted,

SUPREME COURT OF VIRGINIA,
et al.

By: /s/ Gregory E. Lueyk
Counsel

(Certificate of Service Omitted)

VIRGINIA LAWYERS WEEKLY

November 24, 1986

Cite this Page 1 VLW 421

Residency Rule Struck Down

An applicant for admission to the Virginia Bar on the basis of reciprocity need not be a full-time resident of Virginia as long as the applicant intends to practice full time in the Commonwealth, according to a recent U.S. District Court ruling striking down the residence requirement of Virginia Supreme Court Rule 1A:1. That provision, according to Chief Judge Albert V. Bryan, Jr., of Alexandria, violates the Privileges & Immunities Clause of the U.S. Constitution.

Under the decision, *Friedman v. Supreme Court of Virginia*, (No. 86-1130-A), so long as an attorney licensed in another jurisdiction for five years can certify that he or she intends to practice full time as a member of the Virginia bar, the fact that the attorney is living in Maryland, Tennessee, or any other contiguous state will not preclude admission by motion under Rule 1A:1.

But whether the first successful challenge to Rule 1A:1(4)(c) will result in skyrocketing reciprocity admissions in Virginia is the subject of some debate, as the state Supreme Court defendants in the suit consider whether to appeal the *Friedman* case.

Background

Plaintiff Myrna E. Friedman was admitted to the Illinois bar in 1977 and to the District of Columbia bar in 1980. Friedman formerly practiced with the Department of the Navy in Arlington, Va., and with Communications

Satellite Corporation in Washington, D.C. In January 1986, she became Associate General Counsel of ERC International, Inc., and began working at corporate headquarters in Vienna, Virginia.

In February 1986, Friedman married and moved from Virginia, where she had lived since 1977, to her husband's home in Cheverly, Maryland. On June 5, 1980 Friedman submitted her application for admission. In an accompanying letter Friedman stated that although she was not a Virginia resident, the state's concerns should be satisfied, "since there will be no problem as far as a location for service of process is concerned, nor should it be difficult for me to be reached for court appearances should the need arise, since my office is in Virginia." In an affidavit submitted with her motion for summary judgment, Friedman asserted that she would be willing to volunteer for *pro bono* assignments and to fulfill continuing legal education requirements.

Defendant David B. Beach, Clerk of the Supreme Court of Virginia, advised Friedman on June 17, 1986, that because she was not a permanent resident of Virginia, she was not eligible for admission by reciprocity.

Friedman filed suit on September 25, 1986, challenging Rules 1A:1(4)(c) and 1A:3 as violative of the Privileges and Immunities Clause, the Equal Protection Clause and the Commerce Clause.

Summary Judgment Hearing

Defendants' case relied heavily on *Sestric v. Clark*, 755 F.2d 655 (7th Cir. 1985), in which the Seventh Circuit upheld a residency requirement applicable to reciprocity ad-

mission only. However, Cornish F. Hitchcock, of the Public Citizen Litigation Group, who argued Friedman's case, told *Lawyers Weekly* that *Sestric* was factually and legally distinguishable from the *Friedman* case.

The Illinois reciprocity rule at issue in *Sestric* excluded Illinois residents as well as non-Illinois residents, and the Privileges & Immunities clause was held not to apply. Further, the Illinois rule, unlike the Virginia rule, did *not* require members admitted on motion to practice full time in the state. Judge Bryan correctly reasoned that if an attorney is willing to work full time in the state, there is less rationale for requiring them to also *reside* in the state."

"In any event, *Sestric* is completely wrong," continued Hitchcock, "because the U.S. Supreme Court's decision in *New Hampshire v. Piper*, [470 U.S. 274 (1985)], totally undercuts the argument that residence is synonymous with commitment and willingness to do a good job."

"The judge sifted through all the facts, and saw that the only reason Friedman had not been admitted on motion was because of her current residence in Maryland," commented John J. McLaughlin, of Falls Church, Va., who served as local counsel in the case. "This attorney works in Virginia. Her livelihood depends on her knowing Virginia law. Her corporation wants her to be able to go into Virginia courts and do its work. She has made a pledge in Virginia, and that pledge cut through a lot of the state's arguments about her commitment to practice in Virginia," continued McLaughlin.

Supreme Court's Response

Beach, named as a defendant in his official capacity as Clerk of the Supreme Court, indicated that the Court has

yet to decide how it will respond to the decision. He acknowledged that among the options the Court faces are to appeal the case, to modify Rule 1A:1 to conform to Judge Bryan's ruling, or to entirely abandon admission by reciprocity, a change which might require a statutory amendment.

Beach indicated the Court would hold any motion applications of non-residents pending its decision on how to respond to Judge Bryan's ruling.

Attorneys considering submitting such an application should note the elements of Friedman's potentially successful application, recommended counsel for Friedman. The essential element is the commitment to full time practice. Attorney Hitchcock advised attorneys filing the application form to simply assert that they intend to practice full time in the Commonwealth and will not be dividing their time between other jurisdictions. In this respect, Friedman's indication on her application that she was also applying for admission to the Maryland bar apparently did not affect her application in Judge Bryan's eyes.

Although the extras offered by Friedman, such as willingness to do *pro bono* work, may not be absolutely necessary, Attorney McLaughlin would advise submission of such an affidavit where possible.

Impact Of Case

The decision will primarily affect attorneys who live in the metropolitan D.C. area but practice for a Virginia law firm, corporation, or trade association, according to Randall Scott, Executive Director of the voluntary Bar Association of the District of Columbia.

The crucial issue in assessing the impact of the *Friedman* case for practitioners served by his association, said Scott, is the interpretation of (4)(d) of Rule 1A:1, which requires an attorney to "intend" to practice full time in Virginia. "If a well-formed, honest intent at the time of application to practice full time in Virginia is sufficient for admission on motion, the impact of the decision could be significant," stated Scott. The question is whether there is any authority to revoke a license if the bona fide intent to practice in Virginia was evidenced at the time of admission.

Rule 1A:3 provides for enforcement of both the residence and fulltime practice requirements. Judge Bryan's ruling also struck down that portion of the rule which would permit the Supreme Court to revoke the license of an attorney admitted on motion who no longer resided in Virginia. However, neither the Supreme Court nor the State Bar has been actively pursuing enforcement of either the residence or full time practice requirement.

"This is not something that falls within our area of discipline," said N. Samuel Clifton, Executive Director of the Virginia State Bar. According to Clifton, the onus would be on the individual attorney to notify the Court of a change in residence, and the matter likely would be handled administratively through the Court, rather than through policing by the state bar. Bar Counsel Michael L. Rigsby told *Lawyers Weekly* that in the nine years he had been involved in the disciplinary system, he had never seen a disciplinary action involving the Rule 1A:3 residence requirement. Indeed, the full time practice requirement of 1A:3 had arisen only once in that time period, in

a case which turned primarily on other disciplinary violations.

Number of Attorneys Affected

In an affidavit filed with defendants' motion for summary judgment in the *Friedman* case, Beach indicated that in 1985 the Court admitted 106 attorneys to practice under Rule 1A:1, six patent and trademark attorneys under the companion Rule 1A:2, and three law professors. In 1986, through the end of October, the court admitted 113 attorneys to practice under Rule 1A:1, two patent and trademark attorneys, and four law professors.

Defendants in their reply memorandum argued that "there can be no doubt that if residency were eliminated, the number of reciprocity admissions in Virginia would skyrocket, and enforcement [of the full time practice requirement] problems would be greatly compounded."

In support of this assertion, defendants cited the experience of the District of Columbia, which admitted by reciprocity 11,456 attorneys from 1975 to 1981, an average of 1,636 attorneys per year. Defendants raised the spectre of "hit-and-run" practitioners, who would "promise" full-time practice, but actually divide their time between jurisdictions, or even establish sham offices of "office-sharing" arrangements in order to "comply" with the rule.

However, Attorney Hitchcock sees a relatively limited impact for the decision. "It will be useful to people in Friedman's situation, but it won't open any floodgates because the Rule retains the full time practice requirement," said Hitchcock. He noted defendants' affidavit in-

dicating the number of attorneys admitted on motion in 1985 and in 1986, and predicted a slight increase as a result of the *Friedman* decision. "The principal beneficiaries will be experienced attorneys joining Virginia law firms or companies, whose admission will be quicker, since they can now be admitted without taking the bar examination."

McLaughlin declined to speculate on how many attorneys might ultimately be affected by the *Friedman* ruling, should it withstand an appeal. "This is a unique case on the facts," said McLaughlin, since the plaintiff here had no difficulty fulfilling the full-time practice requirement. "I don't know how many people you would have in this fact situation."

VSB Committee

The Virginia State Bar Committee on Legal Education and Admission to the Bar has also been following the *Friedman* case.

The Committee's primary focus, according to its Chairman Daniel A. Carrell of Richmond's Hunton & Williams, has been on the residency requirement of Va. Code § 54-60, which was held to violate the Privileges & Immunities Clause in *Giller v. Virginia Board of Bar Examiners*, No. 83-1282-A (E.D. Va., Feb. 8, 1984). As a result of the U.S. Supreme Court decision in *Piper*, the Virginia Board of Bar Examiners adopted a rule permitting non-resident applicants to sit for the Virginia Bar examination.

"The Committee hasn't tried to formulate a viewpoint on any specific residency requirement," said Carrell.

"Our interest has not been to reflect viewpoints, but to keep track of what's going on and try to decide what would be an appropriate response, either through the legislature or through a change of rules."

"My own view is that I rather doubt the *Friedman* case will have an impact on what the Committee is doing," continued Carrell. He also indicated that he could see the arguments on both sides of the issue of a residence requirement for candidates for admission on motion. "I think there are legitimate issues on both sides and the question ought to be appealed."

A decision on whether to appeal the case will probably come this week, when the Supreme Court convenes in Richmond for the November session of court.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MYRNA E. FRIEDMAN
6432 Forest Road
Cheverly, Maryland 20785
(301) 773-2385,

Plaintiff,

v.

SUPREME COURT OF VIRGINIA
and
DAVID B. BEACH, Clerk,
Supreme Court of Virginia
Supreme Court Building
Richmond, Virginia 23219,

Defendants.

(Filed October 24, 1986)

DAVID B. BEACH, being duly sworn, according to law, deposes and says the following:

1. That I am the Clerk of the Supreme Court of Virginia. In the course of performing the regular and customary duties of the Clerk, I am familiar with the manner in which the Supreme Court administers Rules 1A:1 and 1A:3 of the Rules of the Supreme Court of Virginia, relating to the admission of foreign attorneys to practice in this state without examination.

2. I am submitting this affidavit at the direction of the Court in order to confirm and further define the purpose and intention of those rules as originally set forth in the Court's decisions in *Matter of Brown*, 213 Va. 282 (1972), and *Matter of Titus*, 213 Va. 289 (1972).

3. There is no requirement of residence in Virginia for admission to the state's bar by examination, nor is there is a requirement of residence in Virginia in order to sit and take the bar examination. Any non-resident attorney may gain admission to the Virginia bar without regard to his or her residence by satisfying the usual ethical requirements and by taking and passing the Virginia bar examination. The non-resident attorney, by taking and passing the bar examination, demonstrates a commitment to service in Virginia, and provides assurance that he or she has gained sufficient knowledge of Virginia's laws and procedures to serve the public as a proficient Virginia practitioner. The non-resident attorney thus admitted is free to engage in the practice of law generally in the Commonwealth, and in any other jurisdiction where that attorney may be admitted to practice.

4. The Virginia rule permitting admission without examination was adopted pursuant to the Court's discretionary authority under Va. Code § 54-67, solely to make it easier for a practicing attorney who has permanently relocated in Virginia from another jurisdiction to gain admission to the Virginia bar in cases where the relocating attorney's jurisdiction of origin accords the same privilege to Virginia practitioners. The purpose of the rule is to promote interstate mobility among providers of professional legal services, while securing for the citizens of Virginia an informed, stable and responsible bar. It was never intended to serve as a vehicle for facilitating the multi-jurisdictional practice of law. The provisions of Rule 1A:1 requiring that the relocating attorney "has become a permanent resident of the Commonwealth," and "intends

to practice full time as a member of the Virginia bar" were added simultaneously in their present form to the Foreign Attorney Admission Rule in 1961 [see 202 Va. xii (1961)]. These provisions are interdependent, and are intended to take the place of the assurances otherwise provided by the bar examination.

5. The Court believes that both the full time practice and permanent residence requirements of its rule are necessary to ensure that attorneys seeking admission to the bar without examination have the same professional qualifications of commitment to service to the jurisdiction and familiarity with Virginia law that are demonstrated by those attorneys who gain admission to the bar by taking and passing the bar examination. The full time practice provision promotes attorney competence by mandating frequent and consistent exposure to Virginia law. Aside from the Court's reliance on the good faith of an applicant's assertion in the application that he or she "intend[s] to practice full time as a member of the Virginia bar," (see form of application attached hereto), or the receipt of a third party complaint that the Rule is being violated, there is no other readily available or administratively feasible mechanism for monitoring or enforcing that requirement for all foreign attorneys who have been or may be admitted without examination. The Court believes that compliance with the full time practice requirement is facilitated by requiring the attorney seeking admission without examination to become a permanent resident of the Commonwealth. The applicant's willingness to reside in the Commonwealth in lieu of taking the bar examination demonstrates his or her commitment to service

to the bar of Virginia and to Virginia clients, and ensures that the demands of an out of state practice or residence in a distant location will not stand in the way of the applicant's becoming a proficient Virginia practitioner.

Given under my hand this 21st day of October, 1986.

/s/ David B. Beach
Clerk, Supreme Court of Virginia

STATE OF VIRGINIA)
) to-wit:
CITY/COUNTY OF)

This day personally appeared before me, the undersigned Notary Public, who acknowledged the above signature as his own and made oath that the matters and things stated in the foregoing are true to the best of his knowledge, belief and information.

Given under my hand this 21st day of October, 1986.

My commission expires: August 7, 1989

/s/ Deberah L. Chavis
Notary Public

SUPREME COURT OF VIRGINIA
APPLICATION OF FOREIGN ATTORNEY FOR
LICENSE TO PRACTICE LAW IN VIRGINIA

I, ———, who have heretofore been admitted to practice law in the ——— Court of ———, which is the court of last resort of that ———, am a permanent resident of the Commonwealth of Virginia at ——— and intend to practice full time as a member of the Virginia bar, do hereby apply for a license to practice law in the Commonwealth of Virginia, under the provisions

of Section 54-67 of the Code of Virginia and Rule 1A:1 of this Court, and give the following further information:

Place of birth ——— Date ———

Name of father ——— Name of mother ———

Office address of former residence (No. and Street) ———

(City or town) ———

Are you a native-born citizen, or naturalized? ———

If naturalized, where and when? ———

Has your license to practice law ever been revoked or suspended? ———

Are any charges of unprofessional conduct pending against you? ———

Given under my hand this ——— day of ———, 19—.

(Name) ———

(Address) ———

Subscribed and sworn to before me this ——— day of ———, 19—.

Notary Public

Fee, \$50.00.

STATE OF ——— :

I, ———, Chief Justice of the ——— of the State of ———, which is the court of last resort in said state, do hereby certify that ——— has been entitled to practice law in said court for the last five years, and that at-

torneys from the Commonwealth of Virginia are admitted to practice in this State without examination.

Given under my hand this ——— day of ———, 19—.

Chief Justice of the ———

Court of ———

I, ———, Clerk of the ——— Court of ———, do hereby certify that ——— whose name is signed to the foregoing certificate, was at the time of signing said certificate Chief Justice of the ——— Court of ——— and that the foregoing is his true and genuine signature.

Witness my hand and the seal of said court, this ——— day of ———, 19—

Clerk of the ———

(Seal)

*MOTION OF VIRGINIA ATTORNEY MOVING APPLICANT'S ADMISSION

I, ———, a member of the Virginia bar, hereby move the Court to admit ——— to practice law in this Commonwealth.

Given under my hand this ——— day of ———, 19—.

*This motion is not to be filled in until after the application has been approved by the Court and the applicant appears for introduction to the Court.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MYRNA E. FRIEDMAN,)	
)	
Plaintiff,	)	Civil Action
	)	No. 86-1130-A
v.)	
)	
SUPREME COURT OF	)	(Filed October
VIRGINIA <i>et al.</i>,	)	23, 1986)
)	
Defendants.)	

AFFIDAVIT OF MYRNA E. FRIEDMAN

Myrna E. Friedman hereby declares and states as follows:

1. My name is Myrna E. Friedman. I reside at 6432 Forest Road in Cheverly, Maryland. I am the plaintiff in this case and am submitting this affidavit in support of my motion for summary judgment.

2. I graduated *magna cum laude* from Indiana University School of Law in May 1977. After graduation, I took the Illinois bar examination and was admitted to the Illinois bar in October 1977. I was admitted to the District of Columbia bar by motion in March 1980, and I am currently a member in good standing of both bars.

3. From 1977 to 1982, I was employed as a civilian attorney in the U.S. Department of the Navy, working in the Litigation Division of the Office of the General Counsel in Arlington, Virginia. I was responsible for litigating cases before the Armed Services Board of Contract Ap-

peals, as well as handling some federal court litigation. From 1982 until early 1986, I was an attorney with the Communications Satellite Corporation ("COMSAT") in Washington, D.C., where I drafted contracts, provided legal advice, and participated in some negotiations and litigation.

4. In January 1986, I joined ERC International Inc. as Associate General Counsel. ERC International Inc. is a Delaware corporation which has its headquarters in Vienna, Virginia, where I work. ERC International Inc. has seven subsidiaries incorporated and located in Virginia. My duties include drafting contracts and advising my employer and its subsidiaries on contract matters and securities law. In carrying out these responsibilities, I am regularly asked to offer legal advice on Virginia law. In addition, I have been asked to represent my employer and its subsidiaries in state and federal court in Virginia, which I am unable to do at present, and we refer those cases to outside counsel, which is more costly than if we could handle these cases in-house.

5. When I began work at ERC International, I sought admission to the Virginia bar without examination under Rule 1A:1 of the Rules of the Supreme Court of Virginia. I was interested in being admitted to the Virginia bar in order to represent my employer in litigation in Virginia courts. In addition, since my work entailed drafting contracts, offering legal advice and engaging in similar activities on a full-time basis, I wanted to be sure I would not be engaging in the unauthorized practice of law. While I was eligible to take the bar examination, I did not wish to take time away from my job nor to incur the expense to do so.

(Corrected affidavit page—Filed by Friedman in the District Court on November 7, 1986.)

6. At that time, I was fully eligible for admission under Rule 1A:1, not only because I intended to practice full-time in Virginia, but also because I was then a resident of Virginia, where I had lived continuously since August 1977. When I telephoned the Supreme Court in Richmond, however, I was told that application forms were temporarily unavailable because they were being changed and that I should call back in the spring.

7. In February 1986 I got married and moved from my condominium in Arlington, Virginia to my husband's house in Cheverly, Maryland. I subsequently obtained the forms for admission to the Virginia bar without examination, and on 5 June 1986, I mailed a completed set of papers to the Supreme Court of Virginia.

8. I enclosed with my application a letter in support of my application, explaining that I had lived in Virginia for eight and one-half years and had only recently moved to Maryland to be with my husband. I added that since I would continue to work in Virginia on a full-time basis, I would stay abreast of local rules and practices, and there would be no problem with respect to my availability for court appearances or my amenability to service of process or any legal papers. Although I did not mention it in my letter, I am also willing to handle cases on a *pro bono* basis in Virginia, to attend continuing legal education courses, and to perform any other duties or responsibilities required of members of the Virginia bar. I have attached as Exhibits A and B, respectively, copies of my letter and the questionnaire which the Supreme Court of

Virginia submits to the National Conference of Bar Examiners for a character investigation. I do not have a copy of the application form which is reviewed by the Supreme Court of Virginia.

9. By a letter dated 17 June 1986, David B. Beach, the Clerk of the Supreme Court of Virginia, informed me that my application had been denied. Mr. Beach wrote: "I have been directed to advise you that the Court interprets your letter of June 5, 1986 to be a statement that you are not a permanent resident of the Commonwealth. Thus, you are not eligible for admission to the Virginia bar by reciprocity," citing clause (c) of Rule 1A:1. A copy of Mr. Beach's letter is attached as Exhibit C.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed at Vienna, Virginia this 16th day of October, 1986.

/s/ Myrna E. Friedman

Friedman v. Supreme Court of Virginia, CA 86-1130A

Plaintiff's Exhibit A

ERC

INTERNATIONAL

CORPORATE OFFICE

2070 Chain Bridge Road, Suite 400

Vienna, Virginia 22180

(703) 827-0720

Telex 901986

5 June 1986

Supreme Court of Virginia

Supreme Court Building

100 N. Ninth Street

Richmond, Virginia 23219

Re: Admission on Motion

Gentlemen:

Enclosed herewith is my application and supporting documentation for admission on motion to the bar of the Commonwealth of Virginia. Although my situation is somewhat different from other applicants on motion, I hope you will consider and grant my application.

I became a resident of Virginia in August 1977 and remained so until the beginning of this year. I worked from 1977 to 1982 as a trial attorney for the Navy, in Crystal City (Arlington), Virginia. From March 1982 to January 1986, I was employed as an attorney for Communications Satellite Corporation in the District of Columbia. Throughout, I maintained my home in Virginia. In January of this year, I became Associate General Counsel for ERC International Inc. in Vienna, Virginia. Shortly thereafter, I married a gentleman from Maryland, also an attorney, and moved to his home in Maryland. I continue to own my property in Virginia, and intend to continue working full-time as an attorney for ERC International Inc. in Virginia.

I believe that my circumstances meet the spirit if not the letter of your regulations concerning admission on motion. The only thing separating my situation from a Virginia resident's, who would be eligible for admission on motion, is a few months' time. I also believe my circumstances fit within the purview of *Supreme Court of New Hampshire v. Piper*, 470 U.S. —, 105 S.Ct. 1272 (1985), and the protection of the Privileges and Immunities Clause of the Constitution, Article IV, Section 2, in that there

appears to be no reason to discriminate against my petition as a nonresident for admission to the Bar on motion, since I have only been a nonresident for a few months and have maintained and will continue to maintain other relevant ties to Virginia. Thus, I do not believe that the rationale of *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859 (4th Cir. 1985), *cert. denied*, — U.S. —, 106 S.Ct. 862 (1986), applies to my case, since the only reason I do not fall fully within the scope of the rule is my change of marital status. I believe the state's concerns should be satisfied since there will be no problem as far as a location for service of process is concerned, nor should it be difficult for me to be reached for court appearances should the need arise, since my office is in Virginia. And, of course, it is in my best interest to keep myself as informed of local rules as any other Virginia practitioner. I can understand your reluctance to grant admission on motion to attorneys who intend to practice only occasionally within the state, but as far as the practice of law is concerned, I will be in full-time Virginia practice, so I am effectively in residence in Virginia.

Therefore, I request that the Court grant my application for admission on motion to the bar, based on my employment and other connections to the State.

Thank you for your consideration.

Sincerely,

/s/ Myrna E. Friedman
Associate General Counsel

MEF:sp

APPLICANT'S QUESTIONNAIRE

National Conference of Bar Examiners
333 North Michigan Avenue, Suite 1025
Chicago, Illinois 60601

Friedman v. Supreme Court of Virginia, CA 86-1130-A

PLAINTIFF'S EXHIBIT B

I.

Questionnaire

Name MYRNA ELAINE FRIEDMAN 349-38-9210
First Middle Last Social Security No.

Sex (circle one): Male Female

Date of birth: Month 1 Day 17 Year 1949

Place of birth (City, State, Country) Chicago, Illinois, USA

Area codes and telephone numbers where you can be reached during the next four months

(301) 773-2385 (703) 827-0720 ()
Home Office Other

Current mailing address:

Number and Full Street Name 6432 FOREST ROAD
or P.O. Box — Apartment —

City CHEVERLY

State MD Zip Code 20785

Country USA

1. Circle the name of each jurisdiction to which you are applying for admission. If you are applying to New York, indicate to which Judicial Department (I, II, III, or IV) you are applying.

AL Alabama	ID Idaho	NE Nebraska	PR Puerto Rico
AK Alaska	IL Illinois ✓	NV Nevada	RI Rhode Island
AZ Arizona	IN Indiana	NH New Hampshire	SC South Carolina
AR Arkansas	IA Iowa	NJ New Jersey	SD South Dakota
CA California	KS Kansas	NM New Mexico	TN Tennessee
CO Colorado	KY Kentucky	NY New York—I	TX Texas
CT Connecticut	LA Louisiana	NY New York—II	UT Utah
County	ME Maine	NY New York—III	VT Vermont
DE Delaware	MD Maryland ✓	NY New York—IV	VA Virginia ✓
DC District of	MA Massachusetts	NC North Carolina	VI Virgin Islands
Columbia	MI Michigan	ND North Dakota	WA Washington
FL Florida	MN Minnesota	OH Ohio	WV West Virginia
GA Georgia	MS Mississippi	OK Oklahoma	WI Wisconsin
GU Guam	MO Missouri	OR Oregon	WY Wyoming
HI Hawaii	MT Montana	PA Pennsylvania	Other —

(✓ Denotes circled items in copy)

2. Circle the name of every jurisdiction to which you have previously been admitted. If you were admitted in New York, indicate to which Judicial Department. If admitted in Pennsylvania, complete Form 15.

AL Alabama	ID Idaho	NE Nebraska	PR Puerto Rico
AK Alaska	IL Illinois ✓	NV Nevada	RI Rhode Island
AZ Arizona	IN Indiana	NH New Hampshire	SC South Carolina
AR Arkansas	IA Iowa	NJ New Jersey	SD South Dakota
CA California	KS Kansas	NM New Mexico	TN Tennessee
CO Colorado	KY Kentucky	NY New York—I	TX Texas
CT Connecticut	LA Louisiana	NY New York—II	UT Utah
County	ME Maine	NY New York—III	VT Vermont
DE Delaware	MD Maryland	NY New York—IV	VA Virginia
DC District of	MA Massachusetts	NC North Carolina	VI Virgin Islands
Columbia ✓	MI Michigan	ND North Dakota	WA Washington
FL Florida	MN Minnesota	OH Ohio	WV West Virginia
GA Georgia	MS Mississippi	OK Oklahoma	WI Wisconsin
GU Guam	MO Missouri	OR Oregon	WY Wyoming
HI Hawaii	MT Montana	PA Pennsylvania	Other —

3. List below all the other names or surnames you have used or been known by and describe when, how, and why your name was changed (e.g., "marriage" or "divorce"). If a change was made in a judicial or naturalization proceeding, enclose an exact and complete copy of the order or other evidence of change in the Document Envelope.

First, Middle, Last Name	Used from	Used to	Descrip. of chg.
MYRNA ELAINE FRANKLE	1986	19 present	MARRIAGE

4. Are you a citizen of the United States? ☒ YES ☐ NO
If no, what is your official immigration status?

5. Did you register under the Selective Service Act?

☐ Yes. My Selective Service number was At the time I registered, I resided in (City, State)

☒ No, because it is not required.

6. Mark one choice below to indicate whether you have ever been a member of the armed forces of the United States, including the National Guard or any of the reserve components, and provide any additional information that is requested.

☒ I have never been a member

[] I am still a member; my rank is

My serial number is

Check branch of service:

Air Force Army Coast Guard Marines Navy National Guard

Beginning date of active service

Currently stationed at

Address

City State Zip

Current telephone number []

Name and Telephone number of commanding officer

[] I was a member and received an Honorable Discharge. If you marked this choice, enclose a copy of REPORT OF SEPARATION DD FORM 214 in the Document Envelope and go to Question 7.

[] I was a member, but I did not receive an Honorable Discharge. If you marked this choice, then indicate:

Type of Discharge Service Number

Service rank at discharge

Enclose a copy of REPORT OF SEPARATION DD FORM 214 in the Document Folder.

Circle branch of service:

Air Force Army Coast Guard Marines Navy National Guard

Dates of active service: from (Month) .., 19.. to

(Month) .., 19..

Circumstances surrounding your release

7. List every residence you have ever had during the last ten years or since you were first admitted to the bar in any state (whichever period of time is longer). List addresses in reverse chronological order starting with your current one.

From Mo/Yr To Mo/Yr

2/86 present Address 6432 FOREST ROAD Apt.
City CHEVERLY State MD
Zip 20785 Country if not United States

From Mo/Yr To Mo/Yr

5/81 2/86 Address 2516-B S. ARLINGTON MILL DRIVE

City ARLINGTON

Zip 22206

Country if not United States

Apt.

State VA

From Mo/Yr To Mo/Yr

9/78 5/81 Address 6580 YADKIN COURT

City ALEXANDRIA

Zip 22310

Country if not United States

Apt.

State VA

From Mo/Yr To Mo/Yr

8/77 9/78 Address 1225 MARTHA CUSTIS DRIVE Apt. 1118

City ALEXANDRIA

Zip 22305

Country if not United States

State VA

From Mo/Yr To Mo/Yr

5/77 8/77 Address 6143 N. MOZART STREET

City CHICAGO

Zip 60659

Country if not United States

Apt.

State IL

From Mo/Yr To Mo/Yr

8/76 5/77 Address 322 E. SECOND STREET

City BLOOMINGTON

Zip 47401

Country if not United States

Apt. 9

State IN

From Mo/Yr To Mo/Yr

5/76 8/76 Address 3201 LANDOVER

City ALEXANDRIA

Zip 22304

Country if not United States

Apt.

State VA

8. List below the names of all the Law Schools you attended, their location (including the name of the campus if the school had more than one), the dates attended, and the degree(s) received. Mark "ND" if you did not receive a degree.

Law School INDIANA UNIVERSITY City BLOOMINGTON State IN
From (mo/yr) 8/74 To (mo/yr) 5/77 Degree(s) JD

9. Did you engage in law office study in lieu of attending law school? [] [X] NO

If yes, under the approval of what jurisdiction? —

Indicate when and where: From —, 19 — to —, 19—

Name of firm —

Employer —

Address —

City — State — Zip —

10. List the names of all of the other colleges and universities you attended, their location (including the name of the campus if the school had more than one), the dates attended, and the degree(s) received. Mark "ND" if you did not receive a degree.

College NORTHWESTERN UNIVERSITY

City EVANSTON, State IL

From (mo/yr) 9/69 To (mo/yr) 6/71 Degree(s) MA

College UNIVERSITY OF ILLINOIS

City CHAMPAIGN State IL

From (mo/yr) 9/65 To (mo/yr) 6/69 Degree(s) BA

College AMUNDSEN-MAYFAIR City CHICAGO State IL

From (mo/yr) 9/64 & 6/65 To (mo/yr) 1/65 & 9/65 Degree(s) ND

11. Were you ever expelled, suspended for any reason or otherwise disciplined when you were in college or law school?

[] YES [X] NO

If you marked YES, state the school name, year, type of sanction imposed, and the reasons for it.

School Name _____ Year _____

Type of Sanction _____ Reasons _____

12. List every state to which you ever submitted an application to be admitted by exam, motion or diploma privilege (or reinstated) to the bar, even if you subsequently withdrew the application. For each application, indicate the date it was submitted (or the first exam taken) and its ultimate disposition (admitted to the bar, withdrew application, or not admitted). Explain any withdrawals of applications or failures to be admitted (other than those due to failing the examination). If admitted to the Bar of New York, state the Judicial Department (I, II, III, or IV) to which you were admitted.

Applied for admission Admitted or readmitted

State IL (mo/yr) 7/77 (mo/yr) 10/77

Not admitted because (circle words)

Failed exam Withdraw application Other reason

Please explain fully _____

Applied for admission Admitted or readmitted

State DC (mo/yr) 4/78 (mo/yr) 3/80

Not admitted because (circle words)

Failed exam Withdraw application Other reason

Please explain fully Delay in time was due to large number of applications for admission by motion received by the District of Columbia.

13. List the full name, city, and state of each bar association of which you have been a member. If you have never been a member of any bar association, check this box [] and go to Question 14.

Name of bar association	City (main office)	State
AMERICAN BAR ASSOCIATION	CHICAGO	IL
DC BAR ASSOCIATION	WASHINGTON	DC

14. State the names and addresses of all state and federal trial and appellate courts and administrative agencies before which you have ever been disqualified from practicing law.

Name of court _____ Date admitted _____

Address _____

City _____ State _____ Zip _____

Disqualified from (mo/yr) _____ to (mo/yr) _____

Explanation of the reason for the disqualification _____

Name and address of authority in possession of the records regarding the disqualification:

Name _____

Address _____

City _____ State _____ Zip _____

15. Have you ever been disbarred, suspended, censured, or otherwise reprimanded or disqualified as an attorney, or as a member of any other profession, or as a holder of any public office? [] YES [X] NO

16. Are any charges or complaints (formal or informal) now pending concerning your conduct as an attorney, or as a member of any other profession, or as a holder of any public office? [] YES [X] NO

17. If you marked YES to Question 15 and/or 16, state the date of each action and the name and address of the authority in possession of the records regarding this action.

Year of action: 19— Type of action or complaint —

Name and address of the authority in possession of the records regarding this action.

Name —

Address —

City — State — Zip —

Year of action: 19— Type of action or complaint —

18. Have you ever held judicial office? [] YES [X] NO
If you marked YES, provide the following information about each office:

Held from 19— to 19— Office held —

Address —

City — State — Zip —

Reason for termination if not still held —

19. List below in reverse chronological order starting with your current job, all your legal employment. The list should include self-employment, clerkships, temporary or part time jobs, and military service if in a legal capacity. If you were self-employed, list every address where you were located.

Mo/Yr began Mo/Yr ended

1/86 — Firm or employer ERC INTERNATIONAL INC.
Address 2070 CHAIN BRIDGE ROAD,
SUITE 400
City VIENNA State VA Zip 22180

Mo/Yr began Mo/Yr ended

3/82 1/86 Firm or employer COMMUNICATIONS SATELLITE CORP.
Address 950 L'ENFANT PL. S.W.
City WASHINGTON State DC Zip 20024

Mo/Yr began Mo/Yr ended

8/77 3/82 Firm or employer U.S. NAVY, OFFICE OF GENERAL COUNSEL
Address LITIGATION OFFICE (formerly Contract Appeals Division)
City WASHINGTON State DC Zip 20360

Mo/Yr began Mo/Yr ended

5/76 8/76 Firm or employer U.S. NAVY, OFFICE OF GENERAL COUNSEL
Address HEADQUARTERS
City WASHINGTON State DC Zip 20360

20. Complete one copy of FORM 10 for each job listed in Question 19. Make as many additional copies of FORM 10 as you need to describe each job. Your application will be processed only after you provide all the information requested on FORM 10 for each job.

21. List below in reverse chronological order starting with your most recent job, all non-legal employment you have had in the last ten years or since admission to the bar, whichever period of time is longer. Include self employment, part time, and temporary employment.

Mo/Yr began Mo/Yr ended

— — Firm or employer None
Address —
City — State — Zip —

22. Complete one copy of FORM 11 for each job listed in Question 21. Make as many additional copies of FORM 11 as you need to describe each job (plus two extras for Question 24). Your application will be processed only after you provide all the information requested on FORM 11 for each job.

23. Have you ever applied for (including applications that were withdrawn) or held a license for a business, trade, or profession, other than as an attorney at law, the procurement of which required proof of good character and/or an examination (such as certified public accountant, patent practitioner, or real estate broker)?

[] YES—answer Question 24 [X] NO—go to Question 26

24. Provide the information requested below about each license that required proof of good character and/or an examination.

Mo/Yr Applied — Type of License —

Issuing Authority —

Address —

City — State — Zip —

25. A. Have you ever withdrawn any license application or have you ever been denied a license? ☐ YES ☐ NO
 B. Have you ever had a license revoked? ☐ YES ☐ NO
 C. Have you ever permitted a license to expire?
☐ YES ☐ NO

Explain circumstances: _____

26. Has any surety on any bond on which you were the obligator been required to pay any money on your behalf?
☐ YES ☒ NO
27. Are there any lawsuits or unsatisfied judgments pending against you? ☐ YES ☒ NO
28. Have you ever had a credit card revoked? ☐ YES ☒ NO
29. Have you ever filed or been the subject of a petition in bankruptcy? ☐ YES ☒ NO
30. Have you ever been adjudged a bankrupt or insolvent?
☐ YES ☒ NO
31. Have you ever been charged with fraud, deceit, misrepresentation, forgery, or legal malpractice in any civil, criminal, administrative, or other proceeding? ☐ YES ☒ NO
32. Have you ever been cited, arrested, charged or convicted for any violation of any law (except minor traffic violations)?
☐ YES ☒ NO
33. If you marked YES to any of the seven questions above (26-32), insert in the Document Envelope a complete description of the facts associated with each YES answer on FORM 12. Make as many copies of FORM 12 as you need for this purpose.
34. How many traffic violations have you had in the past eight years? 1
35. During the past eight years, have you ever been addicted to or treated for the use of any drug, including alcohol?
☐ YES ☒ NO

36. During the past eight years, have you ever been treated for any mental, emotional or nervous disorders?
☐ YES ☒ NO
37. Have you ever been voluntarily or involuntarily committed to an institution for mental, emotional or nervous disorders?
☐ YES ☒ NO

38. If you marked YES to Questions 35, 36, or 37 complete:

1. FORM 13, *Medical Records Release*, and insert it in the Document Envelope.
2. FORM 14, *Description of Mental, Emotional or Nervous Disorders*, and insert it in the Document Envelope. Make as many copies of FORM 14 as needed to describe each of the events related to your answers in Questions 35 and 36 above, including dates, location, type of problem, and name and address of attending physician, hospital, or institution.

Your application will be processed only after these documents are accurately and fully completed.

39. State the names and addresses of three references in every locality where you have practiced. If you have not practiced previously, provide the names and addresses of three references in each locality in which you have lived during the past 15 years. References should be persons with whom you are personally acquainted and preferably those who are not your former or present employers or law partners. Do not list anyone as a reference who is related to you by blood or marriage.

Name G. LORRAINE EAVES

Firm Name COMMUNICATIONS SATELLITE CORP.

Address 950 L'ENFANT PLAZA S.W.

Suite No. _____

City WASHINGTON State DC Zip 20024

Telephone (202) 863-6160 Occupation ATTORNEY Years known 4

Name ELIZABETH A. TUNKS

Firm Name NAVY GENERAL COUNSEL

Address LITIGATION OFFICE Suite No. _____

City WASHINGTON State DC Zip 20360

Telephone (202) 746-1000 Occupation TRIAL ATTORNEY
 Years known 8

Name SAMUEL J. GRONER

Firm Name DEPARTMENT OF LABOR

Address 1111-20th STREET N.W., Suite No. 811

City WASHINGTON State DC Zip 20036

Telephone (202) 653-5113 Occupation ADMINISTRATIVE JUDGE

Years known 9

40. Give the names and addresses of two clients who are not related to you by blood or marriage. If you have not had any clients, substitute the names of two law professors or other attorneys. The persons listed here must be different from those listed under Question 39.

Name ARLENE TATE

Firm Name COMMUNICATIONS SATELLITE CORP.

Address 950 L'ENFANT PL. S.W. Suite No. ———

City WASHINGTON State DC Zip 20024

Telephone (202) 863-6710 Occupation PROCUREMENT DIRECTOR Years known 4

Name JAMES McKENNA

Firm Name COMMUNICATIONS SATELLITE CORP.

Address 950 L'ENFANT PL. S.W. Suite No. ———

City WASHINGTON State DC Zip 20024

Telephone (202) 863-6160 Occupation DIRECTOR, GOVERNMENT SALES Years known 4

41. Give the names and addresses of three attorneys who are not related to you by blood or marriage. The attorneys listed here must be different from those listed under Questions 39 and 40.

Name JOHN S. HANNON, JR.

Firm Name COMMUNICATIONS SATELLITE CORP.

Address 22300 COMSAT DRIVE Suite No. ———

City CLARKSBURG State MD Zip 20871

Telephone (301) 428-4780 Years known 4

Name PHILLIP AVRUCH

Firm Name COMMUNICATIONS SATELLITE CORP.

Address 22300 COMSAT DRIVE Suite No. ———

City CLARKSBURG State MD Zip 20871

Telephone (301) 428-4780 Years known 4

Name ROBERT MANSBACH

Firm Name COMMUNICATIONS SATELLITE CORP.

Address 950 L'ENFANT PLAZA S.W. Suite No. ———

City WASHINGTON State DC Zip 20024

Telephone (202) 863-7163 Years known 4

42. Insert three original Notarized copies of the *Authorization and Release Form* in the Document Envelope.

I have read the foregoing document and have answered all questions fully and frankly. The answers are complete and true to the best of my knowledge.

/s/ Myrna E. Friedman

Signature

5/21/86

Date

FORM 10/DESCRIPTION OF LEGAL EMPLOYMENT

Name	Myrna	Elaine	Friedman	349-38-9210
	First	Middle	Last	Social Security No.

Began 1, 1986 Ended ———

Employer or Firm ERC International Inc.
(do not abbreviate)

Firm's address at the time of employment:

Address 2070 Chain Bridge Road, Suite 400

City Vienna State VA Zip 22180

Telephone (703) 827-0720

Firm's current name and address if not the same as above:

Name ———

Address ———

City ——— State ——— Zip ———

Telephone (——) ———

Nature of employer's business Professional Services Company

Immediate Supervisor/Associate William L. Sargeant

Current address 2070 Chain Bridge Road, Suite 400

City Vienna State VA Zip 22180

Position(s) held Associate General Counsel

Reason for leaving N/A

Note: Please discuss fully your reasons for leaving including disciplinary reasons such as excessive absences or tardiness.

If you are a Sole Practitioner, or if firm is now out of business, please provide name, address and telephone number of a verifying reference.

Name _____
 Address _____
 City _____ State _____ Zip _____
 Telephone (____) _____

FORM 10/DESCRIPTION OF LEGAL EMPLOYMENT

Name Myrna Elaine Friedman 349-38-9210
 First Middle Last Social Security No.
 Began 3, 1982 Ended 1, 1986

Employer or Firm Communications Satellite Corp.
 (do not abbreviate)

Firm's address at the time of employment:

Address 950 L'Enfant Plaza S.W.
 City Washington State DC Zip 20024
 Telephone (202) 863-6000

Firm's current name and address if not the same as above:

Name _____
 Address _____
 City _____ State _____ Zip _____
 Telephone (____) _____

Nature of employer's business International Satellite
 Communications

Immediate Supervisor/Associate G. Lorraine Eaves

Current address 950 L'Enfant Plaza S.W.
 City Washington State DC Zip 20024

Position(s) held Attorney, General Attorney

Reason for leaving Obtained better job.

Note: Please discuss fully your reasons for leaving including disciplinary reasons such as excessive absences or tardiness. If you are a Sole Practitioner, or if firm is now out of business, please provide name, address and telephone number of a verifying reference.

Name _____
 Address _____

City _____ State _____ Zip _____
 Telephone (____) _____

FORM 10/DESCRIPTION OF LEGAL EMPLOYMENT

Name Myrna Elaine Friedman 349-38-9210
 First Middle Last Social Security No.

Began 8, 1977 Ended 3, 1982

Employer or Firm U.S. Navy, Office of General Counsel
 (do not abbreviate)

Firm's address at the time of employment:

Address Litigation Division
 City Washington State DC Zip 20360
 Telephone (202) 692-6540

Firm's current name and address if not the same as above:

Name U.S. Navy, Office of General Counsel
 Address Litigation Division
 City Washington State DC Zip 20360
 Telephone (202) 746-1000

Nature of employer's business Attorney for U.S. Navy

Immediate Supervisor/Associate Sandra J. Martell

Current address 4616 Coffey Lane
 City Minneapolis State MN Zip 55406

Position(s) held Trial Attorney

Reason for leaving Obtained better job; desired to move to private sector.

Note: Please discuss fully your reasons for leaving including disciplinary reasons such as excessive absences or tardiness.

If you are a Sole Practitioner, or if firm is now out of business, please provide name, address and telephone number of a verifying reference.

Name _____
 Address _____
 City _____ State _____ Zip _____
 Telephone (____) _____

FORM 10/DESCRIPTION OF LEGAL EMPLOYMENT

Name Myrna Elaine Friedman 349-38-9210
 First Middle Last Social Security No.

Began 5, 1976 Ended 8, 76

Employer or Firm U.S. Navy, Office of General Counsel
 (do not abbreviate)

Firm's address at the time of employment:

Address Headquarters
 City Washington State DC Zip 20360
 Telephone (202) 692-7136

Firm's current name and address if not the same as above:

Name U.S. Navy, Office of General Counsel

Address Headquarters

City Washington State DC Zip 20360
 Telephone (202) 692-7214

Nature of employer's business Attorney for U.S. Navy

Immediate Supervisor/Associate Harvey J. Wilcox, Jon Van Horne
 Current address U.S. Navy, Office of General Counsel (for Mr.
 Wilcox; Mr. Van Horne's is unknown)

City Washington State DC Zip 20360

Position(s) held Law Clerk

Reason for leaving Summer position only.

Note: Please discuss fully your reasons for leaving including
 disciplinary reasons such as excessive absences or tardiness.

If you are a Sole Practitioner, or if firm is now out of business,
 please provide name, address and telephone number of a veri-
 fying reference.

Name _____

Address _____

City _____ State _____ Zip _____

Telephone (____) _____

SUPREME COURT OF VIRGINIA

Supreme Court Building
 Richmond, Virginia 23219

June 17, 1986

CHIEF JUSTICE

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David B. Beach

DEPUTY CLERK

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EXECUTIVE

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Robert N. Baldwin

ASST. EXECUTIVE

SECRETARY

Frederick A. Hodnett, Jr.

CHIEF STAFF

ATTORNEY

John Thomas Bruce

STATE REPORTER

Kent Sinclair

Myrna Elaine Friedman, Esq.
 Attorney at Law
 2070 ChainBridge Road, #400
 Vienna, Virginia 22180

Dear Ms. Friedman:

I have been directed to advise you that the Court in-
 terprets your letter of June 5, 1986 to be a Statement that
 you are not a permanent resident of the Commonwealth of
 Virginia. Thus, you are not eligible for admission to the
 Virginia Bar by reciprocity. Clause (c) of Rule 1A:1.

Upon advice of the Attorney General of Virginia, the
 Court has concluded that the decision in *Supreme Court
 of New Hampshire v. Piper*, — U.S. — (1985), a case deal-
 ing with admission by examination as a matter of right,
 is not applicable to the Court's discretionary requirement

in Rule 1A:1 of residence as a condition of admission by reciprocity.

Accordingly, the application is denied. You will find enclosed your \$50 check and your \$175 certified check.

Sincerely yours,

/s/ David B. Beach
Clerk

DBB:dlh
Enclosures

Friedman v. Supreme Court of
— Virginia, CA 86-1130-A —
Plaintiff's Exhibit C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MYRNA E. FRIEDMAN,

Plaintiff,

v.

CIVIL ACTION
NO. 86-1130-A

SUPREME COURT OF
VIRGINIA, *et al.*,

(Filed Nov. 7, 1986)

Defendants

DAVID B. BEACH, Clerk of the Supreme Court of Virginia, being duly sworn according to law, deposes and says as follows:

1. This will supplement my initial affidavit previously filed along with defendants' papers in this case. I have reviewed the affidavit of plaintiff Myrna E. Friedman attached to plaintiff's Motion for Summary Judgment. In paragraph six of her affidavit, Ms. Friedman alleges that she telephoned the Supreme Court in January, 1986 in order to obtain an application for admission to the Virginia bar, but was told to call back in the spring because they were being changed and were temporarily unavailable. Our application form for admission under Rule 1A:1 has not been changed since October, 1977. Motion admission applications were available upon request in January, 1986, and this office mailed out a number of applications which had been requested in that month. I can only conclude that plaintiff misunderstood what she was told, or perhaps called the wrong office.

Given under my hand this 6th day of November, 1986.

Clerk, Supreme Court of
Virginia

This day personally appeared before me, the undersigned Notary Public, DAVID B. BEACH, who acknowledged the above signature as his own and made oath that the matters and things stated in the foregoing are true to the best of his knowledge, belief and information.

Given under my hand this 6th day of November, 1986.

My commission expires: 4/19/87.

/s/ Deborah J. Henderson
Notary Public

Com. As. Deborah J. Regimbal

MYRNA E. FRIEDMAN,

Plaintiff,

CIVIL ACTION
NO. 86-1130-A

v.

(Filed Nov. 7, 1986)

SUPREME COURT OF
VIRGINIA, *et al.*,

Defendants.

W. SCOTT STREET, III, being duly sworn, according to law, deposes and says the following:

1. I am the Secretary-Treasurer of the Virginia Board of Bar Examiners, which Board is empowered under Va. Code § 54-53, et seq., to administer the Virginia Bar Examination and issue licenses to practice law to applicants who successfully pass the examination and otherwise meet the requirements of the Board. In my capacity as Secretary-Treasurer, I am familiar with the purposes and objectives of the bar examination, and I am custodian of the Board's records relating to the number of examinations administered and licenses issued.

2. There is no requirement of residence in Virginia for admission to the state's bar by examination, nor is there a requirement of residence in Virginia in order to sit and take the examination. The bar examination is administered to resident and non-resident applicants for admission in February and July of each year. The Board intends its examination to be a rigorous test not only of the intellec-

tual fitness generally of an applicant to practice law, but also of an applicant's knowledge and proficiency specifically in Virginia law and procedure. In addition, the Board believes that any applicant for admission to the bar who is willing to take and pass the bar examination exhibits a sincere commitment to service to Virginia, to her bar, and to Virginia clients.

3. In 1985, a combined total of 1,310 applicants sat for the February and July bar examinations. Of this number, 1,136 were residents of the Commonwealth, and 174 were non-residents. A total of 914 applicants passed the 1985 examinations and were issued licenses. Of this number, 786 were residents of the Commonwealth, and 128 were non-residents.

4. In 1986, a combined total of 1,463 applicants sat for the February and July bar examinations. Of this number, 1,227 were residents of the Commonwealth, and 236 were non-residents. A total of 1,036 applicants passed the 1986 examinations and were issued licenses. Of this number, 874 were residents of the Commonwealth, and 162 were non-residents.

Given under my hand this 6th day of November, 1986.

/s/ W. SCOTT STREET, III

Secretary-Treasurer, Virginia
Board of Bar Examiners

COMMONWEALTH OF VIRGINIA)

) to-wit:

CITY OF RICHMOND)

This day personally appeared before me, the undersigned Notary Public, W. SCOTT STREET, III, who ac-

knowldged the above signature as his own and made oath that the matters and things stated in the foregoing are true to the best of his knowledge, belief and information.

Given under my hand this 6th day of November, 1986.

My commission expires: July 22, 1990.

/s/ Beverly F. Pearson
Notary Public

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MYRNA E. FRIEDMAN,)	
)	
Plaintiff,	)	Civil Action
	)	No. 86-1130-A
v.)	
	)	(Filed Nov. 7, 1986)
SUPREME COURT OF)	
VIRGINIA <i>et al.</i> ,)	
)	
Defendants.)	

SUPPLEMENTAL AFFIDAVIT OF
MYRNA E. FRIEDMAN

Myrna E. Friedman hereby declares and states as follows:

1. My name is Myrna E. Friedman. I am the plaintiff in this action, and I am submitting this supplemental affidavit in support of my motion for summary judgment and in opposition to the defendants' motion for summary judgment.

2. In the memorandum in support of their summary judgment motion, the defendants mention the fact that when I applied for admission to the Virginia bar, I also sought admission to the Maryland bar, and they raise the question whether I intend to practice full-time in Virginia, as required under Rule 1A:1(d). I am submitting this affidavit in response.

3. In the letter which accompanied my application for admission to the Virginia bar on motion and in my earlier affidavit, I stated that I intend to practice full-time

in Virginia if admitted to the bar. That has been my intention at all times. While I did take the Maryland practitioners' examination earlier this year (and am waiting to learn the results), there are several reasons why I did this, none of which affects my eligibility for admission to the Virginia bar under Rule 1A:1(d).

4. Both Virginia and Maryland require applicants for admission to their bars to have their character investigated by the National Conference of Bar Examiners (NCBE), and the materials I prepared for submission to the NCBE are attached to my earlier affidavit. If one seeks admission to two bars simultaneously, the NCBE can mail out a single request for information to each previous employer and character reference, analyze the materials that are returned, and submit these data to the licensing bodies in both states. This is more efficient and also less costly to an applicant than asking the NCBE to do the same job twice, and it is also easier on employers and character references if they can respond only once.

5. Although membership in the Maryland bar is not required in my current job, it is possible that my employer or one of its subsidiaries will become involved in litigation in Maryland courts. If that happens (and to my knowledge, it has not occurred to date), my understanding is that we would refer the case to Maryland counsel, but it would still be useful if I could appear on the papers as a member of the Maryland bar. Along the same lines, although I am a member of the District of Columbia bar, any of our litigation in that jurisdiction would also be referred to private counsel.

6. Finally, it is possible that I will leave my current job at some time in the future and take a position which requires regular practice in Maryland. If I gain admission to the Maryland bar now, I could step into any such position promptly if that situation arose. However, that theoretical possibility is remote right now and thus does not affect my eligibility for admission to the Virginia bar at this time.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed at Washington, D.C. this 6th day of November, 1986.

/s/Myrna E. Friedman

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

MYRNA E. FRIEDMAN,

Plaintiff,

CIVIL ACTION
NO. 86-1130-A

v.

(Nov. 14, 1986)

SUPREME COURT OF
VIRGINIA, *et al.*,

Defendants.

MELANIE A. COOVER, being duly sworn, according to law, deposes and says as follows:

1. I am employed by the Virginia State Bar as a Staff Assistant for membership with the responsibility, among other things, of maintaining records relating to membership in the Virginia State Bar.

2. The records of the Virginia State Bar reflect that currently there are 14,314 members engaged in active practice in Virginia. In addition, the bar's records reflect that there are 4,604 associate members who do not engage in active practice, 571 judicial members, and 577 retired or disabled members, for a total membership of 20,066. Of that number, the bar's records reflect that as of June 23, 1986, there were 1,871 non-resident members engaged in active practice in Virginia.

Executed at Richmond, Virginia this 13th day of November, 1986.

/s/ MELANIE A. COOVER

COMMONWEALTH OF VIRGINIA)
) to-wit:
 CITY OF RICHMOND)

This day personally appeared MELANIE A. COOVER before me, the undersigned Notary Public, who acknowledged the above signature as her own and made oath that the matters and things stated in the foregoing are true to the best of her knowledge, belief and information.

Given under my hand this 13th day of November, 1986.

My Commission Expires: 4/19/87.

/s/ Deborah J. Henderson

Notary Public
 Commissioned As Deborah J.
 Henderson

UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF VIRGINIA
 Alexandria Division

MYRNA E. FRIEDMAN,

Plaintiff,

CIVIL ACTION
 NO. 86-1130-A

v.

SUPREME COURT OF
 VIRGINIA, *et al.*,

Defendants.

DAVID B. BEACH, being duly sworn, according to law, deposes and says the following:

1. That I am the Clerk of the Supreme Court of Virginia. In the course of performing the regular and customary duties of the Clerk, I am familiar with the manner in which the Supreme Court administers its Rules relating to the admission of foreign attorneys to practice in this state without examination. In addition, my office mails out applications for admission of foreign attorneys upon request, and maintains records relating to applications mailed.

2. In the three week period between October 23rd and November 13th, 1986, before the District Court's ruling in this case, the Clerk's office mailed out 33 foreign attorney applications to attorneys with addresses in Virginia, and 19 to attorneys with out of state addresses. In the three week period between November 14th and December 5th, 1986, following this Court's ruling, the Clerk's office mailed out 28 applications to attorneys with Virginia ad-

No. 87-399

DEC 19 1987

JOSEPH F. SPANIOLO, JR.

In The
Supreme Court of the United States
October Term, 1987

— o —
SUPREME COURT OF VIRGINIA, and
its Clerk, DAVID B. BEACH,

Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

— o —
**ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT**

— o —
APPELLANTS' BRIEF
— o —

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GAIL STARLING MARSHALL
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QUESTIONS PRESENTED

1. Is admission to a State's bar, without taking and passing that State's bar examination, a fundamental right protected by the privileges and immunities clause of Article IV, Section 2 of the United States Constitution?

2. Does the privileges and immunities clause invalidate the Supreme Court of Virginia's determination that there are substantial reasons for requiring an applicant for licensure, who is already admitted to the bar of another State, to either (1) take and pass the Virginia bar examination, or (2) reside in the Commonwealth in lieu of examination, in order to demonstrate a commitment by the applicant of service to the jurisdiction, and to ensure the attainment by the applicant of proficiency in Virginia law and procedure?

3. Does the privileges and immunities clause impose a stringent standard of justification against the Supreme Court of Virginia's rule requiring residence for admission to the bar without examination where there is no clear discrimination against nonresidents, and where any resident of any state may be admitted to practice in Virginia by taking and passing the bar examination?

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No. 87-399

In The
Supreme Court of the United States
October Term, 1987

SUPREME COURT OF VIRGINIA, and
its Clerk, DAVID B. BEACH,

Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPELLANTS' BRIEF

OPINIONS BELOW

The memorandum order of the United States District Court for the Eastern District of Virginia was not reported and is set forth in the Appendix to the Jurisdictional Statement at Appendix B, p. A-15.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court, is reported at 822 F.2d 423 (4th Cir. 1987). The opinion is also set forth in the Appendix to the Jurisdictional Statement at Appendix A, p. A-1.

JURISDICTION

The jurisdiction of this Court on appeal is invoked under 28 U.S.C. § 1254(2). Virginia Supreme Court Rule 1A:1, a "state statute" within the meaning of 28 U.S.C. §§ 1254(2) and 1257. *See, e.g., Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); and *United States v. Howard*, 352 U.S. 212 (1957).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The privileges and immunities clause, Article IV, § 2 of the United States Constitution, provides in pertinent part:

the citizens of each State shall be entitled to all privileges and immunities of Citizens in the several States. Virginia Supreme Court Rule 1A:1, entitled "Foreign Attorneys—When Admitted to Practice in This State Without Examination", is set forth in full in an Appendix appearing at the end of this brief, at p. App. 1. In summary, the rule provides for admission to the Virginia bar without examination for an attorney who has been licensed to practice law in another jurisdiction for at least five years. The applicant attorney seeking admission without examination must establish that he or she

- (a) Is a proper person to practice law;
- (b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination;

- (c) Has become a permanent resident of the Commonwealth, and;
- (d) Intends to practice full-time as a member of the Virginia bar.¹

Virginia Supreme Court Rule 1A:3, entitled "Revocation of Licenses Issued to Foreign Attorneys," is also set forth in full in an Appendix appearing at the end of this brief, at p. App. 2. This rule simply provides that the Supreme Court of Virginia may revoke the license of any attorney admitted pursuant to Rule 1A:1, following the receipt of satisfactory evidence that such person no longer satisfies the requirements of that rule.

STATEMENT OF THE CASE

1. Factual Background

The appellee, Myrna E. Friedman, is a resident of Cheverly, Maryland. She was admitted to the Illinois bar by examination in 1977 and the District of Columbia bar by reciprocity in 1980. J.A. 30. She worked as a corporate attorney in the District of Columbia for four years, and prior to that was employed for five years in the Office of General Counsel of the United States Navy.

¹ The Supreme Court of Virginia has construed the residency provision of Rule 1A:1(c) as a "date of admission" requirement. *Matter of Titus*, 213 Va. 289, 191 S.E.2d 798 (1972). The full-time practice requirement of Rule 1A:1(d) has been interpreted to mean that an applicant must intend to open an office in Virginia for the practice of law and engage regularly in the practice of law in Virginia from that office. *In re Brown*, 213 Va. 282, 191 S.E.2d 812 (1972).

J.A. 30-31. In January, 1986, she took a job as Associate General Counsel for ERC International, Inc., a "professional services company" located in Vienna, Virginia. She had lived at various locations in Northern Virginia until February, 1986, J.A. 39, when she married and moved to her current residence. J.A. 32.

In June, 1986, she applied for admission to the Virginia bar without examination pursuant to Rule 1A:1. The cover letter attached to her application stated that she intended to reside in Maryland. J.A. 34. Her National Conference of Bar Examiners Questionnaire included with her application also disclosed that she had applied for admission to the Maryland bar at the same time. J.A. 36.

On June 17, 1986, the Clerk of the Supreme Court of Virginia responded to Friedman, advising her that because she was not a permanent resident of Virginia, she was not eligible for admission to the Virginia bar without examination, and her application fees were returned to her. J.A. 51.

On September 25, 1986, Friedman filed a complaint in the United States District Court for the Eastern District of Virginia against the Supreme Court of Virginia and its Clerk, David B. Beach, asserting that the residency requirement of Rule 1A:1 violated the United States Constitution, including the privileges and immunities clause contained in Article IV, § 2. J.A. 2-6. The issues presented to this Court were raised initially in the district court in cross-motions for summary judgment filed by Friedman and the Virginia Supreme Court. On November

14, 1986, the district court entered an order granting Friedman's motion for summary judgment and declaring the requirement of residence for admission without examination violative of the privileges and immunities clause. J.A. 12-14. On December 19, 1986, the district court entered a further order staying its judgment pending appeal.

The issues now raised in this appeal were asserted by the appellants, the Virginia Supreme Court and its Clerk, in their appeal to the United States Court of Appeals for the Fourth Circuit. On June 12, 1987, a panel of the court of appeals consisting of Winter, Chief Judge, Ervin, Circuit Judge, and Young, United States District Judge for the District of Maryland, sitting by designation, issued its opinion affirming the district court's judgment. The appellant's Petition for Rehearing in Banc was denied on July 22, 1987, and on July 31, 1987, the court of appeals entered an order staying its mandate pending appeal to this Court. Appellants timely filed their Notice of Appeal with the court of appeals.

2. Overview of Statutory Framework and Rules Relating to Admission to the Bar in Virginia

The Supreme Court of Virginia has discretion to grant a certificate without examination to any lawyer who has practiced for at least three years in any state or territory of the United States, or in the District of Columbia. Va. Code § 54-67. Since at least 1907, the Supreme Court has implemented this provision by rule of court, *see* former Rule XX, 106 Va. xii (1907). According to the affidavit of Virginia Supreme Court Clerk David B. Beach, the rule was adopted "solely to make it easier

for a practicing attorney who has permanently relocated in Virginia from another jurisdiction to gain admission to the Virginia bar in cases where the relocating attorney's jurisdiction of origin accords the same privilege to Virginia practitioners." J.A. 25. The objective of the rule, as stated by Beach, "is to promote interstate mobility among providers of professional legal services, while securing for the citizens of Virginia an informed, stable and responsible bar. It was never intended to serve as a vehicle for facilitating the multi-jurisdictional practice of law." J.A. 25.

The requirements of Rule 1A:1, that the relocating attorney "has become a permanent resident of the Commonwealth," and "intends to practice full time as a member of the Virginia bar," were added simultaneously in their present form to the Foreign Attorney Admission Rule in 1961. *See* 202 Va. xii (1961). J.A. 25. According to Beach: "These provisions are interdependent, and are intended to take the place of the assurances otherwise provided by the bar examination." J.A. 26. The "assurances" provided by the bar examination are outlined in the affidavit of W. Scott Street, III, Secretary-Treasurer of the Virginia Board of Bar Examiners. Street stated that the Board "intends its examination to be a rigorous test not only of the intellectual fitness generally of an applicant to practice law, but also of the applicant's knowledge and proficiency specifically in Virginia law and procedure. In addition, the Board believes that any applicant for admission to the bar who is willing to take and pass the bar examination exhibits a sincere commitment to service to Virginia, to her bar, and to Virginia clients." J.A. 55-56.

Beach explained in his affidavit that both the full time practice and permanent residence requirements of Rule 1A:1 are necessary to establish "that attorneys seeking admission to the bar without examination have the same professional qualifications of commitment to service to the jurisdiction and familiarity with Virginia law that are demonstrated by those attorneys who gain admission to the bar by taking and passing the bar examination." J.A. 26. The full-time practice requirement promotes frequent and consistent exposure to Virginia law, and compliance with that provision is facilitated by requiring the attorney seeking admission without examination to become a permanent resident. The Virginia Supreme Court believes that "[t]he applicant's willingness to reside in the Commonwealth in lieu of taking the bar examination demonstrates his or her commitment of service to the bar of Virginia and to Virginia clients, and ensures that the demands of an out of state practice or residence in a distant location will not stand in the way of the applicant's becoming a proficient Virginia practitioner." J.A. 26-27.

3. Summary of Virginia Bar Composition

There is no requirement of residence in Virginia for admission to the State's bar by examination, nor is there a requirement of residence in Virginia in order to sit and take the examination. J.A. 25, 55. The record establishes that in 1985-86, 410 nonresidents sat for the Virginia bar examination. Of that number, 290 passed and were admitted to the Virginia bar. J.A. 56. With respect to total bar membership, as of June, 1986, 1,871 out of 14,314, or over 13% of all Virginia members engaged in active practice in Virginia, resided out of state. J.A. 66.

The record also demonstrates that the number of residents who attain admission to the bar pursuant to Rule 1A:1 is small. In 1985, 1,136 resident applicants sought admission to the bar by examination, while only 106 were admitted pursuant to Rule 1A:1. J.A. 54, 56. In 1986, when 1,227 resident applicants sought admission by examination, only 113 were admitted pursuant to reciprocity. J.A. 54, 56. Thus, in the two year period between 1985-86, 91% of all resident applicants to the Virginia bar sought admission by examination, while only 9% were admitted by reciprocity.

4. Overview of Reciprocity Admission Requirements Among the Several States

The practice of admitting to permanent general practice, without additional examination, members of the bar of other states, is known variously as "admission by reciprocity," "admission by comity," or "admission on motion." This is distinguished from admission *pro hac vice* for the trial of a single matter. It is noted that the Rules of the Supreme Court of Virginia, Rule 1A:4, provides for admission *pro hac vice*, and there is no limitation on the types of matters or number of times out-of-state counsel may appear. While the States vary considerably in their treatment of the practice, the typical reciprocity rule requires that the applicant attorney has practiced in another jurisdiction for a prescribed period of time, is in good standing in the State of prior admission, and meets certain additional requirements or "special conditions."

In 1968, out of the fifty States and the District of Columbia, forty-one jurisdictions admitted attorneys by reciprocity without examination. By 1983, only thirty-two

States continued to provide reciprocity.² As of this writing, that number has declined to twenty-three.³ Twenty States now require all applicants to take the regular bar examination,⁴ and eight States require a "special" examination for foreign attorneys.⁵ The nature of this special examination varies. For instance, California and Rhode Island require attorney applicants to sit for the full essay portion of the regular bar examination, while Massachusetts administers a three hour, three question essay examination on Massachusetts practice. See note 3, *supra*.

Among the States which have retained reciprocity, seven require some form of residence as a special condition for admission without examination: Illinois (residence with active and continuous practice in state), Ill. S.Ct. Rule 705; Indiana (residence or in-state office), Ind. Adm. & Disc. Rule 6; Iowa (residence or in-state office) Iowa Code Ann. § 610; Ohio (residence), Ohio S.Ct. R. for Gov't

² Hafter, *Toward the Multistate Practice of Law Through Admission by Reciprocity*, 53 Miss. L.J. 1, 6 n.8 (1983).

³ ALASKA, COLO, CT, DC, ILL, IND, IOWA, KY, MICH, MINN, MD, NEB, NY, OHIO, OKLA, PA, TENN, TX, VT, VA, WVA, WIS, WYO. This information was derived from the *Comprehensive Guide to Bar Admission Requirements, 1986*, published by the American Bar Association and the National Conference of Bar Examiners. The information contained in this manual was verified and updated by this counsel where possible, between November 23, 1987 and December 4, 1987, in correspondence and telephone conversations with appropriate bar admitting authorities in the several States.

⁴ ALA, ARIZ, ARK, DEL, FLA, GA, HAW, IDAHO, KAN, LA, MONT, NEV, NC, NH, NJ, NM, ORE, SC, SD, WASH. See note 3, *supra*.

⁵ CAL, ME, MD, MASS, MISS, ND, RI, UTAH. See note 3, *supra*.

of Bar, R.I. § 9(g); Oklahoma (residence for temporary permit), Okla. R. Adm. to Prac., R. 216); Virginia (residence and full time practice) Va. Sup. Ct. R. 1A:1; and Wyoming (residence) Wyo. Stat. § 33-5-110.

Other States have imposed varied special conditions for admission without examination. Michigan requires an applicant to maintain an office and an active practice in the State, Mich. C.L. 600.946. Tennessee requires a statement of intent to practice in the State, Tenn. R. 7, § 103(v), while Vermont requires three months of study in the office and under the supervision of an attorney practicing in the State, VT Sup. Ct. R. T. 12 App. I, Pt. II. § 7(d).

Finally, it is noted that since this Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), eight States have eliminated reciprocity admission, and now require all attorney applicants to take either the regular bar examination or a special examination.⁶

SUMMARY OF ARGUMENT

This case squarely presents the question whether the Privileges and Immunities Clause of the United States Constitution compels a State to admit to practice before her courts nonresident attorneys who have not established

⁶ ARK (July 1, 1985—regular exam); KAN (July 15, 1987—regular exam); MASS (July, 1985—special exam); MISS (May, 1985—special exam); MONT (January 13, 1987—regular exam); NC (eff. January, 1988—regular exam); RI (November 23, 1987—special exam); UTAH (July, 1986—special exam). See note 3, *supra*.

their competence or offered the considerable commitment to the jurisdiction demonstrated by taking and passing the State's bar examination. The court of appeals' decision declaring appellee Friedman exempt from the Virginia bar examination departs from this Court's decisions defining the scope of the privileges and immunities clause, and fails to give proper deference to the authority of the Virginia Supreme Court to regulate its bar.

The court of appeals erred in holding that admission to a State's bar without examination it is a "privilege" protected by Article IV, § 2. Waiver of the examination has never been regarded by the courts as a matter of "constitutional right"; it is a *quid pro quo* for an attorney's willingness to provide some other form of assurance of commitment to the jurisdiction and competence in local law. Twenty-eight states provide no reciprocity at all, but require *every* applicant to the bar to submit to some form of examination. Thus, the extension or refusal to extend the privilege cannot be regarded as "fundamental to the promotion of interstate harmony." Because admission without examination, in and of itself, implicates no national interest or any of the values protected by the privilege and immunities clause, any special conditions attached to the grant of reciprocity need only bear a rational relationship to a legitimate State interest. This Court has previously held that the Virginia rule satisfies that standard. *Brown v. Supreme Court of Virginia*, 414 U.S. 1034 (1973), *summarily aff'g*, 359 F.Supp. 549 (E.D. Va.).

Even if the Virginia rule is subject to "substantial relation" scrutiny, it meets the requirements of that test.

First, there are substantial reasons for a difference in treatment, because nonresident attorneys who have multi-jurisdictional bar affiliations, and who seek admission to the Virginia bar without examination, offer no personal investment whatsoever in the State. They are entitled to no presumption that they will fulfill their public service responsibilities in the jurisdiction. The fact of nonresidence also presents special problems in securing compliance with Virginia's full time practice requirement. Thus, there is no real assurance that nonresident attorneys will have sufficient contacts with local law to become proficient Virginia practitioners. A bar examination for nonresident attorneys is the only effective alternative to secure the out-of-state applicant's personal investment in the jurisdiction, and to demonstrate the attorney's competence in Virginia substantive and procedural law.

The court of appeals erred in imposing its own legislative judgment of "less restrictive means" on the Virginia Supreme Court's exercise of discretion to provide for reciprocity admission. Where the State's interest is compelling, and the state's regulation does not result in the complete exclusion of nonresidents from the regulated activity, the federal court's inquiry should be limited to whether the regulation adopted by the State provides a "reasonable and adequate" means for a nonresident's access to the activity. *Canadian Northern Railway Company v. Eggen*, 252 U.S. 553, 562 (1920). This Court should hold that the requirement of the bar examination is a reasonable and adequate means for ensuring the competence and commitment of nonresident attorneys seeking admission to a State's bar and is a legitimate, less restrictive alternative than complete exclusion from the bar.

Finally, courts have cautioned that overly aggressive scrutiny of reciprocal admissions provisions will chase states into the certain sanctuary of a bar examination for all. Recent statistics prove that the trend away from reciprocity has commenced. A finding that the requirement of residence for admission without examination is constitutionally infirm may in fact hasten the final balkanization of the legal profession and defeat the purposes of the privileges and immunities clause. This result need not obtain, however, because residence in lieu of the bar examination clearly bears a substantial connection to legitimate State concerns. It should be upheld.

ARGUMENT

I. Admission To A State's Bar Without Examination Is Not A "Fundamental Privilege" Protected By The Privileges And Immunities Clause.

This Court has repeatedly confirmed that distinctions based upon residence are not *ipso facto* precluded by the Constitution. With respect to the privileges and immunities clause, it is only "discrimination against out of state residents on matters of *fundamental concern* which triggers the Clause . . ." *United Building and Construction Trades Council v. Mayor and Council of the City of Camden*, 465 U.S. 208, 220 (1984) (emphasis added) (hereafter "*Camden*").

Some distinctions between residents and non-residents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder

the formation, the purpose, or the development of a single union of those states. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident equally.

Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 383 (1978). The threshold inquiry under Article IV, § 2 then, is whether the subject matter of the enactment "is sufficiently 'fundamental' to the promotion of interstate harmony so as to 'fall within the purview of the Privileges and Immunities Clause.'" *Camden, supra*, 465 U.S. at 218 (citations omitted).

A. Admission to State's Bar Upon Waiver of the Bar Examination May Properly Be Viewed Independently of the Right to Practice Law Generally.

In this case, the subject matter of the enactment under review is admission to membership in the Virginia bar by "special dispensation," i.e., without taking and passing the State's bar examination.⁷ Aside from the Fourth Circuit's decision below, other federal courts that have addressed this question specifically have concluded that reciprocity admission without examination is not a fundamental right protected by the privileges and immunities clause.

⁷ See Note, *A Constitutional Analysis of State Bar Residency Requirements Under the Interstate Privileges and Immunities Clause of Article IV*, 92 Harv. L. Rev. 1461 (1979), pointing out that with respect to residency, different issues may be raised "when nonresidents seek *special dispensations*, either by admission on motion based on experience as a lawyer in another state, or by special admission to argue one case . . .". *Id.* at 1465 (emphasis added).

In *Sestric v. Clerk*, 765 F.2d 655 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 862 (1986), a case nearly identical to the case at bar, a Missouri lawyer challenged on privileges and immunities grounds the Illinois reciprocity rule which required residence in the State as a condition for admission without examination, although nonresidents could be admitted by taking and passing the Illinois bar examination. The Seventh Circuit, in an opinion written by Circuit Judge Richard A. Posner, upheld the district court's grant of summary judgment for the defendants. The court, distinguishing *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (hereafter "Piper"), found that the "privilege" to be evaluated was not the privilege to practice law generally, but the narrower issue of whether there was a constitutionally protected privilege to practice law without passing the State's bar examination. The appeals court concluded that while the requirement that nonresidents take the bar examination may be "inconveniencing," *id.* at 658, it did "not do much damage to the policy of the privileges and immunities clause." *Id.* at 659.

In *Sommermeier v. Supreme Court of the State of Wyoming*, 659 F.Supp. 207 (D. Wyo. 1987), appeal pending, No. 87-1811 (10th Cir.), Chief Judge Clarence A. Brimmer, Jr., reached this same conclusion in upholding a Wyoming law waiving the examination for experienced attorneys establishing a *bona fide* residence in the State. Judge Brimmer stated:

[I]t is highly unlikely that the privilege of avoiding the bar examination is a fundamental right. Although it is related to the professional pursuit of practicing law, it is not one itself. Moreover, the Court is hard pressed to see how avoiding the exam, by it-

self, contributes to national unity, the national economy or any other values which the privileges and immunities clause seeks to protect.

Sommermeier, Id., 659 F.Supp. at 209. These cases confirm that a substantial question exists whether admission without examination ought to be considered a fundamental privilege. Virginia submits that discretionary admission without examination should be examined independently for a determination whether it is a "privilege" protected by Article IV, § 2. And, because admission without examination, in and of itself, has never been regarded, either in practice or at law, as "fundamental to the promotion of interstate harmony," the conclusions reached by the Seventh Circuit and Chief Judge Brimmer should be adopted by this Court.

In *Camden*, this Court noted that public employment "is qualitatively different from employment in the private sector; it is a subspecies of the broader opportunity to pursue a common calling." 465 U.S. at 219. Although the "hiring preference" ordinance at issue in that case was found to implicate the fundamental right, because it biased the employment decisions of private employers, the Court's opinion suggests that the determination whether a *particular activity* constitutes a protected privilege should focus on the specific activity itself. Other courts have employed this contemporary analysis to examine the specific activity at issue for a determination whether it is a matter of fundamental concern. In *International Organization of Masters, Mates and Pilots v. Andrews*, 626 F. Supp. 1271 (D. Alaska 1986), the district court considered a challenge to a State statute providing cost of living wage

adjustments to residents, but making no provision for such adjustments to nonresidents. The Court concluded that although the question of wage adjustment was *related* to the "fundamental" privilege of pursuing employment and economic opportunities in Alaska, the specific "privilege" at issue, *i.e.*, salary adjustments, was "significantly narrower" and unrelated to preserving the national economic union. *Id.* at 1283-84. See also, *Alerding v. Ohio High School Athletic Association*, 779 F.2d 315, 316-19 (6th Cir. 1985), which rejected a privileges and immunities challenge to a state regulation barring nonresident students from participating in state interscholastic sports. The court indicated that the issue was not the fundamental right to obtain an education generally, but whether there was a fundamental privilege to participate in interscholastic sports.

The cases thus support the view expressed in *Sestric, supra*, and *Sommermeier, supra*, that because the privilege of gaining admission to a State's bar without examination is, in effect, a "subspecies" of the right to practice law generally, it may be examined independently for a determination whether it is a matter of fundamental concern.

B. There is No Overriding National Interest in Bar Admission Without Examination Which Requires Protection Under the Privileges and Immunities Clause.

In *Piper*, this Court struck down a State rule *completely excluding* nonresidents from admission to the bar. While *Piper* held that the practice of law was protected by Article IV, § 2, 470 U.S. at 283, this finding was expressly linked to the fact that Kathryn Piper had taken and passed the New Hampshire bar examination, and established

that she fulfilled "the same professional and personal qualifications required of resident lawyers." *Id.*, n. 16. Indeed, as Justice White noted in his concurring opinion, she had "passed the New Hampshire bar," and therefore was "indistinguishable from other New Hampshire lawyers." *Piper*, 470 U.S. at 216 (concurring opinion). Thus, there was no question that Piper had proven she was knowledgeable in local law and procedure, and had affirmatively demonstrated her genuine desire to serve the administration of justice in the State of New Hampshire.

This view that the bar examination is a threshold requirement which must be satisfied before a lawyer may be presumed to be qualified was reaffirmed by the Court's more recent decision in *Frazier v. Heebe*, — U.S. —, 107 S.Ct. 2607, 96 L.Ed.2d 557 (1987) (hereafter "*Frazier*").

Indeed, there is no reason to believe that *non-resident attorneys who have passed the Louisiana bar exam* are less competent than resident attorneys. The competence of the former group in local and federal law has been tested and demonstrated *to the same extent* as that of Louisiana lawyers, and its members are *equally qualified*.

Frazier, *supra*, — U.S. at —, 96 L.Ed. 2d at 566 (emphasis added). In addition, the *Frazier* Court noted that the bar examination required a "personal investment" from the applicant, thus ensuring that the applicant intended a "considerable local practice" in the jurisdiction. *Id.*, 96 L.Ed. 2d at 566-67. The decisions in *Piper* and *Frazier* make clear that the "privilege" to practice law is not absolute. Until an applicant affirmatively demonstrates competence in local law and a considerable commitment to service to the jurisdiction, there is no entitlement to pursue the

"common calling" of the practice of law, and, thus, no privilege protected by Article IV, § 2.

All American jurisdictions utilize written bar examinations for the purpose of verifying the competence of applicants for licensure to practice law because the bar examination "remains the most effective, and the fairest, tool yet devised for the screening of applicants for admission to the bar."⁸ On the other hand, only a minority of American jurisdictions, in an exercise of discretion, permit admission by reciprocity without examination. *See* note 3, *supra*. Indeed, although this Court has never addressed the issue directly, the lower federal courts have uniformly and unanimously held that a State constitutionally may require *all* applicants for admission to the bar to establish their competency by taking and passing its bar examination. *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 863 (4th Cir. 1985) *cert. denied*, 106 S.Ct. 862 (1986); *Attwell v. Nichols*, 466 F.Supp. 206 (N.D. Ga.) *aff'd*, 608 F.2d 228 (5th Cir. 1979); *Shapiro v. Cooke*, 552 F.Supp. 581 (N.D. N.Y. 1982). Twenty-eight States do, in fact, require all applicants for the bar to take an examination. Residents of those states thus are not entitled to admission without examination in any other State. As a practical matter, then, reciprocity admission has never been regarded by the courts as a matter of fundamental concern, nor can the existence or nonexistence of the practice have any impact on the vitality of the nation as a single entity.

⁸ Stevens, *Diploma Privilege, Bar Examination or Open Admission*, 46 Bar Examiner 15, 34 (1977).

The fact remains that "[c]ourts have consistently shown deference to special conditions imposed by states on applications for admission without examination." *Goldfarb v. Supreme Court of Virginia, supra*, 766 F.2d at 863. Substantial deference is appropriate because reciprocity admission is, in effect, a *quid pro quo*, which relaxes the requirement of the examination for attorneys willing to comply with any special conditions which, in the legislative judgment of the admitting authority, may be necessary to secure the assurances of competence and commitment to service demonstrated by the bar examination. Courts have given substantial deference to these special conditions because of the availability of the bar examination, which serves as an adequate, alternative means of gaining admission to the bar. *See, e.g., Lowrie v. Goldenhersh*, 716 F.2d 401, 412 (7th Cir. 1983).

This view finds support in this Court's decision in *Leis v. Flynt*, 439 U.S. 438 (1979):

There is no right of federal origin that permits [out of state] lawyers to appear in state courts without meeting the state's bar admission requirements. This Court, on several occasions, has sustained state bar rules that excluded out of state counsel from practice altogether or on a case-by-case basis. *See, Norfolk and Western R. Co. v. Beatty*, 423 U.S. 1009 (1975), *summarily aff'g* 400 F.Supp. 234 (S.D. Ill.); *Brown v. Supreme Court of Virginia*, 414 U.S. 1034 (1973), *summarily aff'g* 359 F.Supp. 549 (E.D. Va.); *Cf., Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975). These decisions recognize that the Constitution does not require that because a lawyer has been admitted to the bar of one state, he or she must be allowed to practice in another.

Leis v. Flynt, supra, 439 U.S. at 443. The *Leis* Court cited with approval this Court's earlier decision in *Brown v. Supreme Court of Virginia, supra*, which upheld against equal protection and due process challenges the same Virginia requirement of residence for admission without examination at issue here today. These cases clearly support the proposition that so long as a nonresident may gain admission to a State's bar by taking and passing that State's bar examination, no fundamental *national* interest is implicated.

Admission by reciprocity is a practice which is reflective of the fact that this is a Nation composed of individual, sovereign States. To most States, reciprocity is a practice not regarded even as desirable. To others, it is a compromise effort intended to enhance the interstate mobility of legal practitioners while obtaining adequate assurances of attorney commitment and competence. It is not regarded, however, as a matter of fundamental concern. So long as any applicant may gain admission to a State's bar, without regard to residence, by passing the bar examination, the principles underlying the privileges and immunities clause are satisfied. Accordingly, this Court should hold that a State rule which requires residence as a special condition for admission by reciprocity does not discriminate against nonresidents on a matter of fundamental concern, and thus does not trigger scrutiny under the privileges and immunities clause.

II. Virginia's Requirement Of Either Examination Or Continuing Residence For Attorneys Seeking Multi-Jurisdictional Bar Membership Is Substantially Related To Virginia's Compelling Interest In Maintaining A Competent Bar Committed To Serving The Public In This State.

Even if this Court should conclude that admission without examination is a fundamental right protected by the privileges and immunities clause, this finding does not end the inquiry, for "[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute," *Toomer v. Witsell*, 334 U.S. 385, 396 (1947) (hereafter "*Toomer*"), and "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Id.* As this Court stated in *Camden*:

It does not preclude discrimination against citizens of other States where there is a "substantial reason" for the difference in treatment. "[T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." *Ibid.* As part of any justification offered for the discriminatory law, non-residents must somehow be shown to "constitute a peculiar source of the evil at which the statute is aimed."

Camden, 465 U.S. at 222, quoting *Toomer*, 334 U.S. at 398.

The purpose of Virginia's Rule 1A:1, permitting admission to the bar for experienced attorneys upon waiver of the examination, is outlined in the affidavit of David B. Beach, J.A. p. 25. Throughout the proceedings in the courts below, appellee Friedman has asserted that reciprocity admission is, or ought to be, a "fast track, low cost

vehicle" for facilitating the *multi-jurisdictional* practice of law. That has never been Virginia's reason for allowing reciprocity. The Virginia reciprocity rule is intended to apply to a narrowly defined class of persons for a specific objective, i.e., to attract new lawyers who are willing to relocate to Virginia.

The Virginia rule permitting admission without examination was adopted . . . solely to make it easier for a practicing attorney who has permanently relocated in Virginia from another jurisdiction to gain admission to the Virginia Bar in cases where the relocating attorneys' jurisdiction of origin accords the same privilege to Virginia practitioners. The purpose of the rule is to promote interstate mobility among providers of legal services, while securing for the citizens of Virginia an informed, stable and responsible bar.

Beach Affidavit, J.A. 25. While the rule has existed in variety of forms since the early 1900's, it was amended in 1961 to require that the attorney seeking admission without examination "has become a permanent resident of the Commonwealth" and "intends to practice full time as a member of the Virginia bar." These requirements were added simultaneously and became effective on April 1, 1961. See 202 Va. xii (1961). "These provisions are interdependent, and are intended to take the place of the assurances otherwise provided by the bar examination." See Beach Affidavit, J.A. 26.

The specific assurances provided by the Virginia bar examination are set forth in the affidavit of W. Scott Street, III, Secretary-Treasurer of the Virginia Board of Bar Examiners. Street states that the Board intends its examination "to be a rigorous test not only of the intellec-

tual fitness generally of an applicant to practice law, but also of an applicant's knowledge and proficiency specifically in Virginia law and procedure." In addition, the Board believes that any applicant for admission to the bar who invests the time and energy necessary to take and pass the bar examination "exhibits a sincere commitment to service to Virginia, to her bar, and to Virginia clients." J.A. 55-56.

This Court has confirmed that the bar examination plays a crucial role in establishing an attorney's commitment to service to the jurisdiction and knowledge of local law. "As a practical matter, we think that unless a lawyer has, or anticipates, a considerable practice in the New Hampshire courts, he would be unlikely to take the bar examination" *Piper*, 470 U.S. at 285. The *Piper* Court also noted that taking the bar examination evidences an attorney's willingness to remain accountable to the jurisdiction. "One may assume that a high percentage of nonresident lawyers willing to take the state bar examination and pay the annual dues will reside in places reasonably convenient to New Hampshire." *Id.*, 470 U.S. at 286-87.

Moreover, in *Frazier*, this Court observed that "[a] lawyer's application to a particular bar is likely to be based on the expectation of a considerable local practice, since it requires the *personal investment* of taking the state bar examination" *Frazier*, — U.S. at

—, 96 L.Ed. 2d at 566-67.⁹ Where an attorney seeks admission to a state's bar without examination, however, there is no such personal investment, and the assurances inhering in the bar examination are not provided. Accordingly, the Virginia Supreme Court relies upon both the full-time practice and permanent residence requirements of rule 1A:1 to ensure that attorneys seeking admission to the bar without examination will demonstrate the same commitment to service and familiarity with Virginia law that are demonstrated by applicants securing admission upon examination.

The full-time practice requirement promotes attorney proficiency in local substance and procedure by mandating frequent and consistent exposure to Virginia law. As the Virginia Supreme Court has explained, the rule was adopted out of a concern that "the infrequency of [an attorney's] contacts with Virginia law would stand in the way of his becoming a proficient Virginia practitioner." *Matter of Brown*, 213 Va. 282, 287 (1972). This provision of the rule has been upheld against due process, equal protection and commerce clause challenges. See, *Goldfarb v. Supreme Court of Virginia*, *supra*; *Brown v. Supreme Court of Virginia*, *supra*. The residence requirement, in lieu of the bar examination, serves two distinct purposes.

⁹ The literature also confirms that the bar examination serves the public interest by protecting citizens from unskilled practitioners, and safeguarding courts from confusion or congestion that might result if advocates were unfamiliar with principles of law or local practice. In addition, the examination serves as an "educational stimulant," in that it compels a bar applicant to take the time to study and learn the particulars of local substantive and procedural law. See generally, McCarthy, *Who Needs Bar Examinations?*, 5 Cap. U.L. Rev. 197, 209 (1976); Thomas, *The Bar Examination: Its Function*, 32 Bar Examiner 69 (1963).

It is intended, first, to provide a concrete demonstration of the untested applicant's commitment in fact to service to the bar of Virginia and to Virginia clients, and, second, to facilitate compliance with, and the enforcement of, the full time practice requirement. These justifications are substantial, both in their reasons for the difference in treatment of nonresidents, and in their relation to the State's objectives.

The first prong of the privileges and immunities test, that "there is a substantial reason for the difference in treatment", *Piper*, 470 U.S. at 284, stems from the *Toomer* Court's observation that the Clause "does not preclude disparity of treatment in the many situations where there are perfectly valid independent reasons for it." *Toomer*, 334 U.S. at 396. In this regard, it must somehow be shown that nonresidents "constitute a peculiar source of the evil at which the statute is aimed." *Id.* at 398. It has also been stated, in defining this test, that a State's discrimination against nonresidents is permissible where "the presence or activity of nonresidents is the source or cause of the problem or effect with which the State seeks to deal" *Baldwin*, 436 U.S. at 402 (Brennan, J., dissenting).

In this case, Virginia submits that the status of non-residence presents peculiar or special problems which justify Virginia's bar admission rules singling out nonresidents for admission to the bar *solely* by examination. As will be shown below, nonresident attorneys who seek admission without examination have no personal investment in the jurisdiction. They have made no commitment whatsoever to the administration of justice in the State, and are en-

titled to no presumption that they will willingly and actively participate in bar activities and obligations, or fulfill their public service responsibilities to the State's client community. This is particularly so where the nonresident attorney is admitted to the bar of one or more other jurisdictions. Nonresidence also presents special problems in securing compliance with Virginia's full-time practice requirement. Thus, there is no real assurance that nonresident attorneys will become proficient Virginia practitioners.

The second prong of the test requires a showing that "the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, 470 U.S. at 284; *see also*, *Baldwin*, 436 U.S. at 402 (Brennan, J., dissenting). In this case, the discrimination practiced against nonresidents is the requirement that they take the bar examination in order to gain admission to the Virginia bar. As will be shown below, a bar examination for nonresidents is necessary in order to demonstrate a personal investment in the jurisdiction which would otherwise be established by the attorney's residence in the Commonwealth. In addition, where the attorney is admitted to the bar by examination, the full-time practice rule is not applicable, and thus the peculiar problems presented in securing compliance and enforcement of that rule with respect to nonresidents are eliminated. Virginia's rules requiring attorney applicants for admission to the bar to either pass the bar examination or reside in the Commonwealth satisfy any formulation of this test.

A. Nonresident Attorneys with Multiple Bar Membership Who Seek Admission to Another State's Bar Present Peculiar or Special problems which Justify Different Treatment.

In *Piper*, this Court invalidated the New Hampshire Supreme Court's rule requiring residence for admission upon examination because it found no substantial reason for the discrimination against nonresidents. Indeed, the so-called "evil" to which the New Hampshire rule was addressed was nonresidency itself. In this case, however, the "independent reason" or "peculiar source of the evil" sought to be addressed by the Virginia reciprocity rule is not solely non-residency, but is the lack of a commitment to public service to any one jurisdiction which flows from *multiple bar membership*. Like the appellee in this case, nonresident applicants who seek membership in the Virginia bar will likely retain their membership in the bar of one or more other States.¹⁰ Where an attorney is admitted to practice in more than one State, that attorney is obliged to *divide* his or her commitment to public service among *each* of those jurisdictions, i.e., to provide service to clients, fulfill bar obligations and participate in bar activities. In addition, that attorney would require familiarity with, and would be subject to, diverse rules of practice and procedure, and different standards regulating, among other things, lawyer advertising and solicitation; limitations and conditions on fee arrangements and trust account proced-

¹⁰ The appellee, for instance, is already admitted to the Illinois and District of Columbia bars, and her application for admission to the Virginia bar disclosed that she was seeking admission to the Maryland bar at the same time. J.A. 36.

ures; differing continuing ethical and legal education requirements; and the like.

Multiple bar membership thus exposes a practitioner to potentially conflicting standards of practice among different jurisdictions, and would result in a dilution of the practitioner's commitment and service to Virginia clients and to bar related activities and obligations. While the Virginia Supreme Court historically does not favor multi-state admission, *see Matter of Titus*, 213 Va. 289, 294-95 (1972) ("... a hit and run type practice would develop . . ."), it does not prohibit multi-state status among practitioners admitted to the Virginia bar. It does require, however, that all multi-state practitioners demonstrate their commitment to the Virginia bar particularly, and their proficiency and understanding of Virginia law and ethical requirements especially, by taking and passing the State's bar examination. Alternatively, if a practitioner admitted in another jurisdiction seeks admission to the Virginia bar without offering the assurances of commitment and proficiency provided by the examination, then that practitioner must be willing to sever ties with his or her other jurisdictions, including closing out any former practice, and moving his or her residence to Virginia.

B. Virginia's Interests in Requiring A Commitment To The Jurisdiction Are Substantial.

The Supreme Court of Virginia's believes that a practitioner's "commitment to the jurisdiction" is more than a platitude. Virginia expects its lawyers to be guided by a spirit of public service in all their endeavors as members

of this bar. The commitment required by the Virginia Supreme Court's rules and ethical standards entails a commitment to the protection and service of Virginia clients; a commitment to participate willingly in the activities and obligations of the Virginia bar; and a commitment to improve the legal system and further the administration of justice in Virginia. This Court has specifically approved the public service aspects of the practice of law.

We recognize, of course, and commend the spirit of public service with which the profession of law is practiced, and to which it is dedicated. The present members of this court, licensed attorneys all, could not feel otherwise. And we would have reason to pause if we felt that our decision today would undercut that spirit.

Bates v. State Bar of Arizona, 433 U.S. 350, 368 (1977). See also *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 461 (1978) (service and protection of clients further the goals of "true professionalism").

The lawyer's commitment to the Virginia bar likewise requires willing participation in the spirit of public service. The Virginia State Bar is a fully integrated bar, with membership required of all attorneys admitted to practice in the courts of the Commonwealth. See Rules of the Supreme Court of Virginia, Rules for the Integration of the Bar, Part 6, § IV, ¶ 2; *Button v. Day*, 204 Va. 547, 132 S.E.2d 292 (1963). This Court has held that lawyers may be required to support a professional bar organization, despite disagreement with its public positions or policies, because of the greater benefit to the profession and to society that would result from an integrated bar. *Lathrop v. Donohue*, 367 U.S. 820, 843-45 (1961). Virginia also ad-

heres to the view, often expressed by this Court, that lawyers are "officers of the courts", and are essential to the primary governmental function of administering justice. *Bates v. State Bar of Arizona*, 433 U.S. 350, 361-62 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). In Virginia, bar members are expected to participate in all phases of bar governance and the implementation of its objectives,¹¹ including the selection of Bar Council members in each of Virginia's thirty-one judicial circuits, Rules of the Supreme Court of Virginia for the Integration of the Bar, Pt. 6, § IV, § 6; participation when appointed in disciplinary committee proceedings in Virginia's ten District Committee jurisdictions, Pt. 6, § IV, § 13; participation in judicial nomination and recommendation proceedings at the judicial circuit level upon the creation of a vacancy on the bench in that circuit; see, e.g. Art. VII, § 7.01, By-Laws of the Bar Association of the City of Richmond; and participation in the numerous standing committees and substantive law sections established to promote and improve the administration of justice in Virginia. Pt. 6, § IV, ¶ 9(d).

Virginia also seeks the support of its bar members in the bar's Interest on Trust Accounts Program (IOTA), a *voluntary* program in which participating attorneys pay all interest income earned on their attorneys' trust ac-

¹¹ These objectives are: "To cultivate and advance the science of jurisprudence; to promote reform in the law and judicial procedure; to facilitate the administration of justice; to uphold and elevate the standards of honor, of integrity and of courtesy in the legal profession; to encourage higher and better education for membership in the profession; and, to promote a spirit of cordiality and brotherhood among the members of the Virginia State Bar." Pt. 6, § IV, ¶ 9(i).

counts to the Virginia Bar Foundation, which distributes the funds primarily to Virginia's legal aid programs serving indigent Virginians. The IOTA program generated \$663,834.00 for distribution to these public interest programs in the 1984-85 fiscal year. *See* Rules of the Supreme Court of Virginia, Pt. 6, § II, DR 9-102(E)(2); *Status of IOTA Program*, Va. Bar News, Vol. 34, No. 4, p. 9 (Oct. 1985).

Bar member participation also facilitates Virginia's Lawyer Referral Service. This program, operated by the bar's Special Committee on Lawyer Referral, provides a no-cost referral service to Virginia clients seeking legal assistance. Virginia bar members, who participate on a volunteer basis, agree to provide a reduced-fee consultation for any client referred by the service. The program now handles more than 2,500 calls a month from Virginia clients. *See* Forty-Eighth Annual Report of the Virginia State Bar, June 30, 1986, pp. 85-86.

Virginia's disciplinary rules, in conjunction with the bar's Special Committee on Public Education, also promote attorney involvement in public service activities relating to furthering the administration of justice and improving the legal system in Virginia. The Rules of the Supreme Court of Virginia, Ethical Considerations of Canon 2, provide that lawyers "should encourage and participate in educational and public relations programs concerning our legal system, with particular reference to legal problems that frequently arise," and to participate in "seminars, lectures, and civil programs . . . to increase the public's awareness of legal needs and its ability to select the most appropriate counsel." Rules of the Su-

preme Court of Virginia, Pt. 6, § 2, Canon 2, EC 2-2. In addition, the Ethical Considerations of Canon 8 hold that "lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus, they should participate in proposing and supporting legislation and programs to improve the system. . . ." Rules of the Supreme Court of Virginia, Pt. 6, § 3, Canon 8, EC 8-1.

This Court concluded in *Piper* that nonresident bar members would not be "disinclined to do their share of *pro bono* and volunteer work," and along with resident bar members "could be *required* to represent indigents and perhaps to participate in formal legal aid work." 470 U.S. at 287. Virginia does not dispute that these conclusions are appropriate in circumstances where nonresident bar members, like Piper, have taken and passed the State's bar examination. Their application to attorneys who have made no "personal investment" in the jurisdiction, however, is unwarranted. Attorneys seeking multi-jurisdictional bar admission through "fast track, low cost" reciprocity procedures are not entitled to a presumption that they will facilitate the governance and public service functions of a State bar. It is simply illogical to presume that an attorney admitted to the bar in Virginia, Maryland and the District of Columbia will participate in bar governance functions, bar disciplinary functions, judicial selection procedures, bar programs intended to promote and improve the administration of justice, public education programs, trust account interest or lawyer referral programs in three different States.

Indeed, after the district court's decision in this case, one of plaintiff's counsel observed that while 'the *extras* offered by Friedman, such as a willingness to do *pro bono* work, may not be absolutely necessary, Attorney McLaughlin would advise submission of such an affidavit *where possible*.' J.A. 19. Thus, in Friedman's counsel's formulation, support for the bar is an "extra" to be accommodated "where possible." And even if we could presume that multi-jurisdictional practitioners would make an effort to support the bar's public service functions, there is no question that those attorneys would be obliged to *divide* their participation among the several jurisdictions in which membership is obtained. Multiple bar membership thus diminishes the lawyers ability to become and remain active. This does not satisfy the commitment to the Virginia bar envisioned by the Virginia Supreme Court, and accordingly, the court requires from such attorneys some *affirmative* showing of a high level of commitment.

Finally, while the Fourth Circuit did not address Virginia's contention that residence in the State ensures the untested attorney's commitment to the jurisdiction, the court's opinion contains language which suggests that the full-time practice component of the rule fulfills this function. *Friedman, supra*, 822 F.2d at 429. This is not the case. The "promise" of full-time practice included in Virginia's Foreign Attorney Application is just that and no more. Unlike the bar examination, or residence in the state, both of which provide a concrete demonstration of a practitioner's commitment to a continuing presence in the State, it requires no personal investment on the part of an

applicant to simply sign the application document containing the full-time practice admonition. And as will be shown below, that requirement may be more easily circumvented by a nonresident who continues to maintain ties to another jurisdiction.

In any event, the fact that Virginia may have adopted a more effective reciprocity program, including requiring residence *and* full-time practice, ought not to be a basis for striking down the Virginia Supreme Court's effort to maintain a committed and competent bar. Such a result is undesirable in a properly functioning federal system of co-existing State and national jurisdictions, and is not mandated by any of the policies underlying the privileges and immunities clause.

C. Virginia's Interests in Promoting Compliance With its Full-Time Practice Requirement are Substantial

As stated previously, Virginia relies upon the full-time practice component of Rule 1A:1 to promote familiarity with Virginia law among practitioners who are exempted from the bar examination. It is noted that aside from the Virginia Supreme Court's reliance on the good faith of an applicant's assertion that he or she "intend[s] to practice full-time as a member of the Virginia bar," or the receipt of a third party complaint that the Rule is being violated, there is no other readily available mechanism for monitoring or enforcing that requirement for all foreign attorneys who have been or may be admitted without examination. As one commentator has noted, "[a] requirement of 'continuing practice' measured in billable hours per year performed within the subject

jurisdiction would present substantial policing problems.” *Haft*, note 2, *supra*, at 41, n. 138. Neither would it be feasible or desirable to maintain an investigative staff to monitor adherence to the rule. Accordingly, as an alternative to the establishment of a complex administrative enforcement mechanism, the Virginia Supreme Court determined that the physical presence in the state entailed by residence would ensure compliance with full-time practice. Residence promotes this objective in three ways. It insulates the practitioner from the demands of a former or potentially developing out-of-State practice, it ensures that the practitioner will remain subject to the continuing scrutiny of the legal community, and it helps to define and lend consistency to the in-State requirement of the full-time practice provision.

The Fourth Circuit dismissed these justifications for residency asserting that there was no evidence in the record to suggest that Friedman would not take her promise of full-time practice seriously. The fallacy of the court’s argument, however, aside from the fact that it requires Virginia to presume the integrity of any non-resident applicant for admission, is that Virginia’s foreign admission rule does not apply only to “in-house corporate counsel,” with a narrow and focused practice such as Friedman. There is no dispute that in-house counsel constitutes a fundamentally unique type of practice. The American Corporate Counsel Association (ACCA) has long asserted that because in-house corporate counsel practitioners do not serve the public generally, they should be treated differently for purposes of bar admission requirements. In fact, ACCA has advocated a national standard

for admission that would *exempt* inside corporate counsel from its requirements. See ABA/BNA Lawyers Manual on Professional Responsibility, Vol. 1, No. 50, p. 1095 (Dec. 11, 1985). Virginia’s foreign attorney admission rule, however, must apply to all attorneys seeking reciprocity admission, the bulk of whom will be sole practitioners or associated with law firms. Two recent surveys conducted among bar members in Virginia show that only eight percent of all active practitioners in Virginia are “in-house counsel.”¹² On the other hand, 26 percent are partners in law firms and 23 percent are sole practitioners with their own office or an office sharing arrangement.¹³

These figures support the conclusion that most non-resident reciprocity applicants may have been or will be associated with an office or firm in their jurisdiction of residence, or like many sole practitioners, also operate out of an office in their home. They will likely have an established body of clients who would continue to seek legal services in their home jurisdiction, and through their out-of-state personal and community associations would generate new client contacts. Given these circumstances, there is logically a much greater likelihood that nonresident attorneys would be inclined more than residents to main-

¹² In addition, 70 percent are identified as “private practitioners”, 11 percent are “government lawyers,” and those remaining are judges, law school faculty, or in “other” categories. See *Professional Activity and Attitude Survey*, Virginia State Bar (May 3, 1985), p. 9 (based upon responses from 5,100 active members of the Virginia bar).

¹³ See, “Portrait of a Profession”, *Virginia Lawyers Weekly*, Vol. II, No. 9, August 3, 1987, p. 1, 16, (original survey results and tables also available in the offices of the Virginia Lawyers Weekly, 1205 East Main Street, Richmond, Virginia 23219).

tain or acquire an out-of-state practice and deviate from the restrictions of full-time practice, thus defeating the purpose of that provision. The requirement of residence in the State therefore serves in a concrete fashion the legitimate purpose of facilitating compliance with the full-time practice rule, because it insulates the multi-jurisdictional practitioner from the demands of a former or potentially developing out-of-state practice.

The requirement of residency for applicants admitted to the bar without examination also aids the enforcement of the full-time practice requirement because it ensures that the untested practitioner will remain subject to the continuing scrutiny of the legal community in Virginia. *See, e.g., In Re Griffiths*, 413 U.S. 717, 726 (1973) ("once admitted to the bar, lawyers are subject to continuing scrutiny by the organized bar and the courts"). A non-resident practitioner can more easily avoid detection of non-compliance with full-time practice simply by virtue of the fact that his or her activities outside the state are not subject to monitoring by the legal community in Virginia. Effective enforcement of full-time practice thus requires that an attorneys' principal contacts remain in Virginia, within the purview of the Virginia legal community. The enhanced exposure of the untested resident attorney to the Virginia community minimizes the possibility that the practitioner may establish a sham office or "mail drop" in the state to avoid compliance with full-time practice.

Finally, because they are mutually reinforcing provisions, the residence requirement of Rule 1A:1 is effective

in providing a consistent and understandable interpretation of the full-time practice requirement. Absent the clear and unequivocal mandate of in-state *residence*, the in-state obligations of the untested attorney will be subject to "interpretation." For example, following the district court's decision in this case, Randall Scott, the Executive Director of the District of Columbia Bar Association, offered his own interpretation of the commitment to full-time practice.

The crucial issue in assessing the impact of the *Friedman* case for practitioners served by this association, said Scott, is the interpretation of (4)(d) of Rule 1A:1, which requires an attorney to "intend" to practice full time in Virginia. "If a well-formed, honest intent at the time of application to practice full time in Virginia is sufficient for admission on motion, the impact of the decision could be significant," stated Scott. The question is whether there is any authority to revoke a license if the bona fide intent to practice in Virginia was evidenced at the time of admission. J.A. 19-20.

Under Scott's interpretation, so long as one "intends" to practice full-time upon admission, it is immaterial if one has a change of heart later on. Scott's comments are illustrative of a cavalier attitude which belies the Fourth Circuit's assertions that nonresidents are no less likely to honor their promise to practice full-time in Virginia, or that compliance with full-time practice could be assured by requiring an "annual renewal" of the attorney's promise. An annual promise demonstrates no personal investment in the jurisdiction. If the requirement of residence were eliminated, the only concrete assurance of an in-state full-time practice would disappear, and the rule would be subject to self-serving interpretation and chicanery.

Finally, it may reasonably be predicted that if the requirement of residence were eliminated from Virginia's rule, the number of reciprocity admissions would greatly increase, and the difficulties in ensuring compliance with full-time practice would be significantly compounded. By way of example, one commentator noted that from 1975 through 1981, there were 19,772 new attorneys admitted to practice in the District of Columbia. Of that number, 11,456 were admitted by reciprocity (an average of 1,636 per year) while only 8,316 were admitted by examination.

[Th]e volume of admissions by reciprocity in the District can only be explained by the absence of residency requirements that allow attorneys who have no intention of relocating their homes and principal places of practice in the District of Columbia area to be freely admitted to its bar on motion. While the District of Columbia is not a typical jurisdiction, its experience with respect to the frequency of reciprocal admission, in the absence of residency requirements, is instructive of what may occur in other jurisdictions.

Hafter, note 2, *supra*, p.37.¹⁴ If Virginia cannot rely upon an attorney's residence in the jurisdiction to ensure compliance with its full-time practice requirement, it simply will not be able to rely on full-time practice as a means of assuring that attorneys admitted without examination are qualified as proficient Virginia practitioners.

In light of all the above, Virginia submits that its justifications for the requirement of residence in the State

¹⁴ Friedman's own evidence illustrates the volume of reciprocity admissions in the District. She applied for admission in April, 1978, but did not gain admission until March, 1980. As she explained, "[d]elay in time was due to large numbers of applications for admission by motion received by the District of Columbia." J.A. 41.

upon admission to the bar without examination are substantial, not only in their reasons for the difference in treatment of residence and nonresidency, but also in the relation of those reasons to Virginia's legitimate objectives of maintaining a knowledgable and technically competent bar with a commitment to service in the Commonwealth.

As a final matter, this Court has noted that in deciding whether the discrimination bears a close or substantial relationship to the State's objective, the Court has considered the availability of "less restrictive means." *Piper*, 470 U.S. at 284. The application of less restrictive means analysis to this case will now be considered.

III. A Stringent Application Of The Less Restrictive Means Test Is Inappropriate In This Case, Because Nonresidents Are Not Excluded From Admission To The Virginia Bar, And Passing The State's Bar Examination Is A "Reasonable And Adequate" Means By Which Admission May Be Obtained.

"Less restrictive means" analysis in the context of the privileges and immunities clause was first articulated by this Court in *Toomer v. Witsell*, *supra*. There, the Court held that nonresident fishermen could not be required to pay a license fee of \$2,500 for each shrimp boat owned when residents were charged only \$25 per boat. Such a requirement was "so drastic as to be a near equivalent of total exclusion." *Id.*, 334 U.S. at 398. The Court noted that the State could eliminate the danger of excessive trawling through less restrictive means, by restricting the type of equipment used in its fisheries, graduating license fees according to the size of the boats, or indeed "even [charging] nonresidents a differential which would merely com-

pensate the State for any added enforcement burden they may impose” *Id.*, 334 U.S. at 398. This form of analysis was not employed again until the Court’s decision in *Piper* which, citing *Toomer*, noted that “the Court has considered the availability of less restrictive means.” The common thread in these two cases is that consideration of less restrictive means is appropriate where an enactment results in the “total exclusion” of nonresidents from the regulated activity.¹⁵

Less restrictive means analysis has been strongly criticized. As Chief Justice Rehnquist noted in his dissenting opinion in *Piper*:

[S]uch an analysis, when carried too far, will ultimately lead to striking down almost any statute on the ground that the Court could think of another “less restrictive” way to write it. This approach to judicial review, far more than the usual application of a standard of review, tends to place courts in the position of second guessing legislators on legislative matters. Surely this is not a consequence to be desired.

Piper, 470 U.S. at 295-96 (Rehnquist, J., dissenting). An overly broad application of less restrictive means analysis conflicts with this Court’s observation that “every inquiry under the privileges and immunities clause must . . . be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.”

¹⁵ It is noted that in *Hicklin v. Orbeck*, 437 U.S. 518, 528 (1978), the Court stated that the State’s means must be “closely tailored” to achieving the State’s ends. The Court, however, did not suggest in that case any less restrictive means by which Alaska could achieve its goal of aiding the unemployed.

Camden, 465 U.S. at 223-24, quoting *Toomer*, 334 U.S. at 396.

This case presents for the first time unique circumstances requiring further consideration of the scope of less restrictive means analysis. Unlike *Piper*, we are not concerned here with the complete exclusion of nonresidents from the bar. Indeed, admission to the Virginia bar may be obtained, without regard to residence, by simply taking and passing the bar examination, and the record in this case establishes that over thirteen percent of all active practitioners enrolled in the Virginia bar (1,871 out of 14,314) are nonresidents admitted by examination. J.A. 56. Moreover, unlike *Toomer*, which dealt with harvesting shrimp, we are concerned here with admission to a State’s bar, a matter over which federal policy accords substantial deference to the individual, sovereign States.

This Court has long recognized that “the States have a compelling interest in the practice of professions within their boundaries, and . . . have broad power to establish standards for licensing practitioners and regulating the practice of professions.” *Goldfarb v. Virginia State Bar*, *supra*, 421 U.S. at 792. Moreover, “[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left *exclusively* to the states and the District of Columbia within their respective jurisdictions. The states prescribe qualifications for admission to practice and the standards of professional conduct.” *Leis v. Flynt*, *supra*, 439 U.S. at 442 (emphasis added). Indeed, the Court recently noted that its “[a]ttention has not been drawn to any trade or other profession in which the licensing of its members is determined directly by the sovereign itself—

here the State Supreme Court.” *Hoover v. Ronwin*, 466 U.S. 558, 580 n. 34 (1984).

In light of this authority, a State’s interest in regulating the practice of law clearly is greater than any interest a State may have in regulating shrimpers, as in *Toomer*, or pipeline workers, as in *Hicklin*. Where the State’s interest is indeed compelling, and the discrimination practiced against nonresidents is not complete exclusion, as in *Piper*, but relates to furthering legitimate State interests, this Court should be loathe to impose upon the State any less restrictive means it can imagine which, in its legislative judgment, might achieve a like result.

Here, Virginia has established the compelling nature of its State interests. It seeks to secure for the citizens of Virginia a knowledgeable and competent bar committed to serving Virginia clients and furthering the administration of justice in the Commonwealth. Virginia has heeded this Court’s admonition in *Piper* that these goals may not be achieved by denying to nonresidents the right to practice law in the Commonwealth, and has adopted a means which indisputably is less restrictive than complete exclusion. It simply requires nonresidents to take and pass the State’s bar examination. As this Court noted in *Frazier v. Heebe*, *supra*, the requirement of an examination for non-resident attorneys is a “more effective means” for ensuring lawyer competence than “complete exclusion” from the bar. *Id.*, — U.S. at —, 96 L.Ed. 2d at 367. Passing the examination demonstrates the nonresident lawyer’s personal investment in the jurisdiction, ensures that the applicant is proficient in Virginia practice

and procedure, and entitles the nonresident attorney to practice law in Virginia under the same terms and conditions as other members of the bar.

In cases such as this, a less restrictive means analysis is more appropriately guided by the principles articulated in this Court’s decision in *Canadian Northern Railway Company v. Eggen*, 252 U.S. 553 (1920). That case dealt with the fundamental privilege of “the right of a citizen of one state, . . . to institute and maintain actions of any kind in the courts of another.” This Court upheld against a privileges and immunities challenge a Minnesota statute of limitations provision which allowed only residents to sue in State court on a cause of action which would have been barred by the statute of limitations in the State where the cause of action arose. The Court stated:

The principle on which this holding rests is that the constitutional requirement is satisfied if the nonresident is given access to the courts of the state *upon terms which, in themselves, are reasonable and adequate* for the enforcing of any rights he may have, even though they may not be technically and precisely the same in extent as those accorded to resident citizens.

Eggen, *supra*, 252 U.S. at 562 (emphasis added). These principles are appropriate for application to the case at bar. The privileges and immunities clause does not require that nonresidents be given “precisely the same rights” as resident citizens. *Id.*, 252 U.S. at 561. Where the discrimination against nonresidents is not “complete exclusion,” and the State’s authority over the subject matter of the regulation historically is exclusive and compelling, then the inquiry ought to be limited to whether the

means governing the nonresident's access to the regulated activity are "reasonable and adequate." In this case, this Court should confirm that admission to the bar by examination is a reasonable and adequate means available to nonresident attorneys who seek to practice in Virginia's courts. Indeed, it is the means which must be utilized by 91% of all Virginia residents who seek admission to the bar. The acceptance of this view would eliminate the need for this Court to second guess the State's choices in cases where the issue is not complete exclusion, and would give substance to the principle that the States should have "considerable leeway" in addressing local needs.

In this respect, the Fourth Circuit's declaration that the requirement of a bar examination itself is an unreasonable burden on the privilege of practicing law must not be permitted to stand. There is nothing unreasonable about the bar examination. As noted previously, it "remains the most effective, and the fairest, tool yet devised for the screening of applicants for admission to the bar." Stevens, note 8, *supra*. Judge Posner correctly observed that the bar examination is "a substitute commitment for residence." *Sestric v. Clark, supra*, 765 F.2d at 661.

The Virginia Supreme Court's bar admission rules thus offer the practitioner a compromise: a waiver of the bar examination for those willing to sever their ties to their former jurisdictions, and to commit their professional energies exclusively to the Virginia bar in the service of Virginia clients. For those unwilling to demonstrate this personal and professional commitment, the Virginia Supreme Court offers an alternative mechanism for

such practitioners to become members of the bar while maintaining their ties to their other jurisdictions, and that is by simply taking and passing the Virginia bar examination. These are terms which, in themselves, are reasonable and adequate for the enjoyment of any right a nonresident may have to practice law in Virginia.

Finally, it is significant that "[c]ourts have consistently shown deference to special conditions imposed by states on applications for admission without examination. . . . [T]here exists the danger that ruling conditions on reciprocal admissions unconstitutional will chase states into the one certain sanctuary of a bar examination for all." *Goldfarb v. Supreme Court of Virginia, supra*, 766 F.2d at 863. The Seventh Circuit in *Sestric v. Clark, supra*, expressed this same concern: "If Sestric's claim prevails, the states will have to decide whether to end this privilege or stand willing to admit on motion most lawyers in the country." *Sestric, supra*, 765 F.2d at 663. Another commentator has noted that an expansive application of the *Piper* decision "may have the unexpected effect of actually making it more difficult to practice across state lines." ABA/BNA Lawyer's Manual on Professional Responsibility, Vol. 1, No. 41, p. 903 (Aug. 7, 1985).

Recent statistics suggest this trend has already commenced. In 1968, forty-one jurisdictions admitted attorneys by reciprocity without examination. By 1983, that number had declined to thirty-two,¹⁶ and today, only

¹⁶ Hafter, note 2, *supra*.

twenty-three jurisdictions out of fifty-one offer admission without examination. If the requirement of residency for admission without examination is found to be constitutionally infirm, the predictions of the Fourth and Seventh Circuits may become fact. The unfortunate irony of this situation is that the Constitution requires no such result. Admission without examination requirements ought to be upheld so long as they are rationally related to the state's interest in maintaining a committed and competent bar, and do not invidiously discriminate upon some suspect criterion. Privileges and immunities considerations have no connection to discretionary admission without examination. Those interests are upheld by the right of all persons, within and without the State, to gain admission to the bar by satisfying the requirements of the bar examination. It is the unnecessarily aggressive application of this constitutional provision which will deal the final blow to reciprocity.

The Virginia Supreme Court does not believe its bar admission certificate should be treated as an "honorarium" or a "collectible" to be hung in law office walls across the country. The Court demands, as it has a right to, that its attorneys have a strong commitment of service to the bar and to clients in Virginia, and that they be knowledgeable and proficient in Virginia law and procedure. The requirement of residence in lieu of examination clearly bears a substantial connection to this legitimate objective. It should be upheld.

CONCLUSION

The courts below erred in holding that Virginia's requirement of residence for admission without examination violates the privileges and immunities clause. The clause does not provide a basis for relief because there is no right of admission to a State's bar without examination that is "fundamental to our national interest." It is also clear that the fact of nonresidence presents peculiar or special problems which justify a bar examination for non-residents, and it cannot be disputed that the requirement of the bar examination bears a substantial relationship to the State's compelling interest in maintaining a committed and competent bar. Finally, the requirement of the bar examination for nonresident applicants serves as a less restrictive means for achieving the State's goals, and provides a reasonable and adequate means by which non-residents may gain admission to the Virginia bar.

For all of the above reasons, appellants respectfully request this Honorable Court to reverse the decision below and enter judgment in their favor.

Respectfully submitted,

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APPENDIX

App. 1

Rule 1A:1. Foreign Attorneys—When Admitted to Practice in This State Without Examination.

Any person who has been admitted to practice law before the court of last resort of any state or territory of the United States or of the District of Columbia may file an application to be admitted to practice law in this Commonwealth without examination, if counsel licensed to practice here may be admitted to practice there without examination.

The applicant shall:

(1) File with the clerk of the Supreme Court at Richmond an application, under oath, upon a form furnished by the clerk.

(2) Furnish a certificate, signed by the presiding judge of the court of last resort of the jurisdiction in which he is entitled to practice law, stating that he has been so licensed for at least five years.

(3) Furnish a report of the National Conference of Bar Examiners concerning his past practice and record.

(4) Pay a filing fee of fifty dollars.

Thereafter, the Supreme Court will determine whether the applicant:

(a) Is a proper person to practice law.

(b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.

(c) Has become a permanent resident of the Commonwealth.

App. 2

(d) Intends to practice full time as a member of the Virginia bar. In determination of these matters the Supreme Court may call upon the applicant to appear personally before a member of the Court or its executive secretary and furnish such information as may be required.

If all of the aforementioned matters are determined favorably for the applicant, he shall be notified that some member of the Virginia bar who is qualified to practice before the Supreme Court may make an oral motion in open court for his admission to practice law in this Commonwealth.

Upon the applicant's admission he shall thereupon in open court take and subscribe to the oaths required of attorneys at law, where upon he shall become an active member of the Virginia State Bar.

Rule 1A:3. Revocation of Licenses Issued to Foreign Attorneys.

Following receipt of evidence satisfactory to the Supreme Court that a person who has been admitted to practice pursuant to Rule 1A:1 no longer satisfies the requirements of clause (c) or (d) of that section or that a person who has been admitted to practice pursuant to Rule 1A:2 no longer satisfies the requirement of clause (c) of that section, the Supreme Court may revoke the license issued to him. Following receipt of evidence that a person who has been admitted to practice pursuant to Rule 1A:1 or Rule 1A:2 has been disbarred pursuant to Part Six of the Rules, the Supreme Court will revoke the license issued to him.

UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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(i)

QUESTION PRESENTED*

May a state, consistent with the Privileges and Immunities Clause, the Equal Protection Clause and the Commerce Clause, waive its bar examination requirement for experienced lawyers who live in that state, while denying that option to equally qualified lawyers solely because they live in another state?

*In addition to the parties identified on the cover, the American Corporate Counsel Association appeared as *amicus curiae* supporting Ms. Friedman in the court of appeals.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

No. 87-399

SUPREME COURT OF VIRGINIA
and DAVID B. BEACH, Clerk,
Supreme Court of Virginia,

Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The issue in this case is whether Virginia may constitutionally grant its residents an advantage that is not afforded to nonresidents in determining eligibility for admission to the Virginia bar. Under the court rule held unconstitutional by both lower courts here, experienced lawyers who live in Virginia and who meet certain other criteria may be admitted to the Virginia bar without taking a bar examination, whereas equally qualified lawyers who live outside Virginia must take the bar examination. Because none of the reasons advanced for this discriminatory treatment meets the applicable constitutional standards, the judgment below should be affirmed.

A. Bar Admissions in Virginia: An Overview

There are two methods by which a person may obtain a license to practice law in Virginia. The first method, which is available to both experienced practitioners and to individuals who do not hold a license to practice law, is to take and pass a two-day bar examination, which is administered in February and July of each year by the Virginia Board of Bar Examiners. Applicants wishing to take this examination must be over the age of eighteen years, be of good moral character, and have graduated from an accredited law school. Va. Code § 54-60.¹

An alternative licensing scheme exists pursuant to Va. Code § 54-67, which empowers the Supreme Court of Virginia to adopt rules allowing lawyers who have been licensed for at least three years in another jurisdiction to be admitted to the Virginia bar without taking a bar examination, a process known as "motion admissions" or "admissions on motion." Motion admission rules have existed in Virginia for most of this century. See former Va. S. Ct. R. XX, 106 Va. xii (1907). The rule now in effect, Rule 1A:1, requires an applicant to have been licensed for at least five years by a jurisdiction which admits Virginia bar members without examination. An applicant must also show that he or she:

- (a) Is a proper person to practice law.
- (b) Has made such progress in the practice of law that it would be unreasonable to require him to take an examination.
- (c) Has become a permanent resident of the Commonwealth.

¹The statute previously contained a residence requirement which was held to violate the Privileges and Immunities Clause in *Giller v. Virginia Board of Bar Examiners*, Civ. No. 83-1282-A (E.D. Va. 8 February 1984), and was subsequently repealed.

- (d) Intends to practice full time as a member of the Virginia bar.

The residence requirement in subsection (c) is the focus of this case, but a brief history of Virginia's motion admission rules may shed some light on the justifications offered for the restriction today. When former Rule XX was adopted in 1907, it required motion applicants to have practiced law in another jurisdiction for at least three years and did not require them to live in Virginia. 106 Va. xii. Starting in 1938, motion applicants were required to live in Virginia for six months before filing their application, 172 Va. lxxii, and they were later required to state an intention to devote the "major portion" of their time to Virginia practice. 184 Va. lxxxix (1946). These two amendments were made to former Rule 23, which was later recodified as former Rule 1:5. 190 Va. lxxxiv (1949).

Motion applicants were not required to establish "permanent" residence in Virginia until 1961, at which time they were also obliged to declare an intention to practice law "full time" as members of the Virginia bar. 202 Va. xii. And in 1968, the Supreme Court of Virginia adopted former Rule 1:5.2, which provided that lawyers admitted on motion may lose their license if they move out of Virginia or cease full time practice there. 208 Va. cxxxvii. These rules were recodified in their current form in 1972 as Rules 1A:1 and 1A:3, respectively. 214 Va. 779 (1972).

Appellants' brief states (at 5-7, 22-23) that from 1907 on, Virginia's motion admission rules were intended to benefit only those experienced lawyers who had permanently relocated to Virginia. That assertion rests entirely on an affidavit from David B. Beach, the present Clerk of the Supreme Court of Virginia (J.A. 24-27), in which he discusses the aims of the current Rule, but does not purport to state what factors impelled the

Supreme Court of Virginia to undertake rulemaking in 1907, 1938, 1946, 1961 or 1968. Nor does he explain why the rule became progressively more restrictive or point to any contemporaneous explanatory statements on this subject. While we do not believe that the outcome of this case turns on the length of time that the current restrictions have been in place, it cannot be said, as appellants' brief argues, that Rule 1A:1 embodies an unswerving policy of 80 years' duration which this Court should be reluctant to overturn.²

B. Prior Proceedings

Appellee Myrna E. Friedman was admitted to the Illinois bar in 1977, to the District of Columbia bar in 1980, and to the Maryland bar in 1987 and is a member in good standing of all three (J.A. 30). From 1977 to 1981, she served as a lawyer with the Department of the Navy in Arlington, Virginia, and from 1982 until January 1986, she was a lawyer with Communications Satellite Corporation in Washington, D.C. (J.A. 30-31). In January 1986, she became Associate General Counsel of ERC International Inc. and began working at the company's headquarters in Fairfax County, Virginia. Ms. Friedman's duties include drafting contracts and advising her employer and its subsidiaries (which are Virginia corporations) on contract matters and securities laws, including matters of Virginia law. Her employer also wants her to represent the company and its subsidiaries in litigation, including cases in Virginia courts (J.A. 31).

²So far as we are aware, the Supreme Court of Virginia has construed Rule 1A:1's residence requirement only once. *Application of Titus*, 213 Va. 289, 191 S.E.2d 798 (1972). With respect to the Rule's full time practice requirement, that court has stated only that lawyers must maintain an in state office and a "regular" practice in Virginia. *Application of Brown*, 213 Va. 282, 286 n.3, 191 S.E.2d 812, 815 n.3 (1972).

When Ms. Friedman began work at ERC International, she lived in Virginia and thus satisfied the requirements of Rule 1A:1 (J.A. 30, 38-39). One month later, however, she married and moved to her husband's house in Cheverly, Maryland (J.A. 32, 38). In June 1986 she applied for membership in the Virginia bar under Rule 1A:1. In a letter filed with her application, she candidly acknowledged that she was no longer a resident of Virginia, but asked that her application be granted nonetheless. She stated that Virginia's "concerns should be satisfied since there will be no problem as far as a location for service of process is concerned, nor should it be difficult for me to be reached for court appearances should the need arise, since my office is in Virginia" (J.A. 35). She added that since she was working full time in Virginia, she would stay informed of developments in Virginia law, as it would be "in my best interest" to do so (J.A. 35). She later affirmed her willingness to undertake *pro bono* assignments, to attend continuing legal education courses "and to perform any other duties or responsibilities required of members of the Virginia bar" (J.A. 32).

Her application was nonetheless denied. By letter dated 17 June 1986, the Clerk of the Supreme Court of Virginia told Ms. Friedman that he had "been directed to advise you that the Court interprets your letter of June 5, 1986 to be a statement that you are not a permanent resident of the Commonwealth of Virginia. Thus, you are not eligible for admission to the Virginia bar by reciprocity," citing Rule 1A:1(c) (J.A. 51). He acknowledged this Court's decision in *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which invalidated an in-state residence requirement imposed on nonresidents who sought to be admitted to a state bar after taking a state's bar examination, but stated that the Supreme Court of Virginia had construed *Piper* as applying only to examination candidates and not to the "discretionary require-

ment in Rule 1A:1 of residence as a condition of admission by reciprocity" (J.A. 51-52).

On 25 September 1986 Ms. Friedman filed suit in the United States District Court for the Eastern District of Virginia. She sought declaratory and injunctive relief on the ground that Rule 1A:1(c), as well as the provision in Rule 1A:3 which threatens motion admittees with having their licenses revoked if they move out of Virginia, violated the Privileges and Immunities Clause, the Equal Protection Clause and the Commerce Clause of the United States Constitution (J.A. 2-6).

Both sides moved for summary judgment. After hearing argument on 14 November 1986, the district court (Bryan, C.J.) ruled that Rule 1A:1(c) violated the Privileges and Immunities Clause, but not the Equal Protection or Commerce Clauses (J.A. 11-14, J.S. App. A15). The court rejected the idea that one's proficiency in the law is enhanced by living in Virginia (J.A. 13). He also concluded that a lawyer's commitment to Virginia "can't be enhanced by residency unless you assume that the commitment she has made of agreeing to practice full time in Virginia is not going to be complied with; and I have no reason to think, and it hasn't been established on this record certainly, that nonresidents are any less likely to live up to their commitments than residents" (J.A. 13). The court termed the notion that nonresidents were less likely than residents to comply with the full time practice requirement "a provincialism we cannot indulge" (J.A. 13).

The Fourth Circuit unanimously affirmed on 12 June 1987 (J.S. App. A1-A14). The court (per Winter, C.J.) rejected appellants' threshold claim that the Privileges and Immunities Clause does not protect nonresident motion applicants because they had the option of taking the bar examination. As the court held, the pertinent inquiry is not whether nonresidents are completely barred from earning their livelihood in a state, but

whether they are treated on substantially the same terms as residents, inasmuch as the "Clause guarantees to the citizens of the nation that they may do business within a state on the same terms as the citizens of that state" (J.S. App. A6-A7). The court found this guarantee to be violated here, because the Rule discriminates on its face against residents of other states (J.S. App. A7-A8).

The court of appeals added that the Rule "certainly imposes a burden on the practice of law that justifies application of the scrutiny required by Article IV, § 2," inasmuch as examination applicants must pay a fee, spend time and money studying for the examination, wait several months for the results to be announced, and still face a risk of failure (J.S. App. A8-A9). The Rule thus operates "to deter attorneys who are leaving their previous practice to practice in this region, and who plan to live in Washington or Maryland, from competing with members of the Virginia bar," and it encourages lawyers to buy a home in Virginia, although they may prefer to live elsewhere (J.S. App. A9). Noting that this provision "is arguably designed as a means of economic protectionism with the attendant adverse effect of disrupting interstate harmony," the court held that Rule 1A:1(c) was subject to the Privileges and Immunities Clause (J.S. App. A9).

Turning to appellants' defenses of the Rule, the court found "no nexus between residence and lawyer competence and Virginia points to none" (J.S. App. A13). Nor was the court persuaded that living in Virginia promotes compliance with Rule's full time practice requirement. Noting that Virginia has established no mechanism to enforce this requirement, the court characterized the latter argument as little more than an assertion that Virginia residents are more likely to honor this commitment than nonresidents, and it found no basis for saying that a Virginia resident "will be more truthful than a

nonresident in stating his intention, or in carrying out his commitment, to practice full time in Virginia" (J.S. App. A13). The court added that there were less restrictive ways to achieve this goal, such as requiring all motion admittees to certify annually that they are complying with the full time practice rule (J.S. App. A14).

Finally, the court rejected the claim that the residence and full time practice requirements were "inter-dependent." The court concluded that, since the full time practice rule required motion applicants to have an office in Virginia, it was likely that any nonresidents would "live in places reasonably convenient to Virginia," and thus the residence requirement was "redundant" (J.S. App. A13-A14).

SUMMARY OF ARGUMENT

The judgment should be affirmed because the outcome of this case is controlled by *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) ("Piper"), which held that the Privileges and Immunities Clause bars a state from excluding nonresidents from its bar. Although *Piper* involved an applicant who had taken the state's bar examination, whereas this case involves an applicant seeking admission on motion, there is no valid basis for reaching a different result in the two cases. Rule 1A:1 offers qualified Virginia residents an inexpensive and speedy method for gaining a license to practice law, thus giving them an advantage over equally qualified applicants who happen to live in another state. That is precisely that sort of favoritism that is barred by the Clause, absent a substantial justification, and none exists here.

Appellants argue that the Clause does not apply because Virginia provides nonresidents the option of taking a bar examination. This Court has never held, however, that the protec-

tions of the Clause are available only when a state absolutely forecloses nonresidents from enjoying a privilege that is available to residents. Indeed, the Court has invalidated a number of state laws which did not totally exclude out-of-staters, but, as here, subjected them to burdens which were not imposed on state residents. And while Virginia may have no obligation to offer anyone the option of being admitted on motion, the state cannot condition the availability of that option in a way that impinges on constitutionally protected rights, in this case, the right to reside in the state of one's own choosing. The lower courts thus correctly examined Rule 1A:1(c) under the exacting standard used in Privileges and Immunities Clause cases.

The lower courts also correctly rejected the justifications advanced in defense of this Rule. Appellants make no claim that living in Virginia assures a lawyer's competence. Instead, they argue that the residence requirement assures one's commitment to Virginia and promotes compliance with Virginia's full time practice requirement for motion applicants. Neither justification is substantial enough to save the Rule.

Piper recognized that, as a practical matter, lawyers are unlikely to seek admission to a state's bar unless they contemplate a considerable practice in that state, and their anticipation and hope of earning a livelihood there is likely to assure that they act as competently and ethically on behalf of their clients as do residents. This point applies with equal force to motion applicants and applicants willing to take an examination. Motion applicants, no less than examination applicants, must commit themselves to paying the fee in order to gain their license, along with annual dues thereafter, and they must satisfy any requirements a state imposes, such as continuing legal education or mandatory *pro bono*, in addition to the re-

quirements imposed by other jurisdictions in which they are licensed.

Under the circumstances, there is no basis for concluding that a residence requirement assures a certain level of commitment which would otherwise be lacking, but even if there were, Virginia's full time practice rule provides a complete answer. If Virginia can insist that motion applicants must practice law full time in Virginia, there is surely no basis for impugning their commitment to Virginia, and the residence requirement is at best redundant, as the court of appeals recognized.

Nor does Virginia's residence requirement substantially assist compliance with the full time practice rule. Ms. Friedman has made the same commitment to full time practice that Virginia requires of its own residents, and thus the only way that this argument can be credited is if the Court assumes that Virginia residents are more truthful and more likely to honor their professional commitments than nonresidents. There is certainly no basis for reaching such a conclusion here. Moreover, Virginia has adopted no mechanism to enforce its full time practice requirement, but even if it did wish to assure compliance with that rule, there are less restrictive and far more effective ways of doing so than imposing a residence requirement, for example, by requiring an annual certification of compliance with the rule.

Rule 1A:1(c) is also invalid under the Equal Protection and Commerce Clauses. In recent Terms, this Court has struck down a number of state tax laws which discriminated against residents of other states, and in doing so, the Court employed a standard of review under the Equal Protection Clause that is more deferential to the state than that employed in Privileges and Immunities Clause cases. From a Commerce Clause perspective, the residence requirement is directly analagous

to state laws which favor entities having an in-state plant or office over entities which lack such a facility or which condition eligibility for a benefit on having such a facility, both of which have routinely been held invalid.

ARGUMENT

I. VIRGINIA'S RESIDENCE REQUIREMENT FOR MOTION APPLICANTS IS INVALID UNDER THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. Motion Admissions Are Subject to the Privileges and Immunities Clause.

1. Traditional Privileges and Immunities Clause Analysis Governs This Case.

Article IV, Section 2, Clause 1 of the United States Constitution, known as the Privileges and Immunities Clause, states:

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This Clause was intended by the Framers "to help fuse into one Nation a collection of independent, sovereign States" and to "insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948)(footnote omitted).

The Court explained the importance of this Clause in *Austin v. New Hampshire*, 420 U.S. 656, 660-65 (1975): "During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread. The fourth of the Articles of

Confederation was intended to arrest this centrifugal tendency with some particularity." *Id.* at 660. While the "discriminations at which this Clause was aimed were by no means eradicated during the short life of the Confederation," the provision was "carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation." *Id.* at 660-61 (footnotes omitted). See also *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 180 (1869) ("no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this").

In assessing claims of discrimination under this Clause, a reviewing court must first determine whether the activity in question falls within its scope. This threshold inquiry is required because the protections of the Clause apply "[o]nly with respect to those 'privileges' and 'immunities' bearing on the vitality of the Nation as a single entity." *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978). In *Baldwin*, the Clause was held not to apply to a law charging nonresidents a higher fee than residents for a license to hunt elk. The Court reasoned that since elk-hunting is "recreation" and not a "means of a livelihood," the right to a hunting license was not "fundamental" to promoting interstate harmony. *Id.* at 388.

The Court has made it clear, however, that the Clause does apply to state laws regulating "the pursuit of a common calling," and many of this Court's Privileges and Immunities Clause cases "have dealt with this basic and essential activity." *United Building & Construction Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 219 (1984) ("Camden"). As stated in *Hicklin v. Orbeck*, 437 U.S. 518, 525 (1978), "a resident of one State is constitutionally entitled to travel to

another state for purposes of employment free from discriminatory restrictions in favor of state residents imposed by the other state." See also *Toomer v. Witsell*, *supra*; *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1871).

If this threshold test is met, the law in question must be subjected to exacting scrutiny. Thus, under *Toomer v. Witsell*, *supra*, discrimination against nonresidents is allowed only if they are "a peculiar source of the evil" at which the law is aimed, 334 U.S. at 398. As set forth in the Court's most recent statement of this test, the Clause allows discrimination against nonresidents only where "(1) there is a substantial reason for the difference in treatment; and (ii) the discrimination practiced against nonresidents bears a substantial relationship to the State's objective." *Piper*, *supra*, 470 U.S. at 284. The latter element includes examining the "availability of less restrictive means." *Id.*

In *Piper*, the Court struck down a state court rule which limited admission to the New Hampshire bar to state residents. After canvassing its earlier decisions, the Court stressed that "the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause," 470 U.S. at 280 n.9, and concluded that "the opportunity to practice law should be considered a 'fundamental right'" that falls within the ambit of the Clause. *Id.* at 281. "Like the occupations considered in our earlier cases, the practice of law is important to the national economy," and the legal profession also "has a noncommercial role and duty" — such as defending unpopular causes which local counsel may be unwilling to undertake — which makes the protections of the Clause particularly important. *Id.*

The Court then examined the rationales advanced by the state, namely, that nonresidents were less likely to: (1) remain familiar with local rules and practices; (2) behave ethically;

(3) be available for court proceedings; and (4) do *pro bono* and other volunteer work. The Court rejected each of these justifications. Specifically, it found no basis for assuming that "a nonresident lawyer — any more than a resident — would disserve his clients by failing to familiarize himself with the rules" or laws in effect in that state. *Id.* at 285. The Court also "found no reason to believe that a nonresident lawyer will conduct his practice in a dishonest manner," adding that one's "professional duty and interest in his reputation should provide the same incentive to maintain high ethical standards as they do for resident lawyers." *Id.* at 285-86.

Nor did the Court believe that the need to have lawyers available for hearings called on short notice warranted excluding nonresidents from the bar, noting that most lawyers seeking general admission to a state bar were likely to "reside in places reasonably convenient to New Hampshire." *Id.* at 287. The Court also found it reasonable to assume that most lawyers who are admitted to a state bar would perform their share of volunteer duties, adding that nonresidents and residents alike could be compelled to undertake mandatory *pro bono* assignments. *Id.* Finding no substantial reason for excluding nonresidents, the Court invalidated the rule.

The Court reached the same conclusion last Term in *Frazier v. Heebe*, 107 S. Ct. 2607 (1987), which struck down a federal district court rule requiring members of that court's bar to live or have an office in the state where the court sat. Although the case was decided in an exercise of the Court's supervisory authority, the Court employed the Privileges and Immunities Clause analysis of *Piper* in deciding that neither the residence nor the office requirement advanced the asserted goals of lawyer competence and availability for hearings. *Id.* at 2612-14.

In our view, the rationale employed in *Piper* controls the outcome of this case. Just as the rule in *Piper* gave an ad-

vantage to New Hampshire residents, Rule 1A:1 offers Virginia citizens an inexpensive and speedy method for obtaining a license to practice law in Virginia, while denying that option to equally qualified nonresidents. It is precisely this sort of favoritism that the Clause prohibits and which this Court held invalid in *Piper*, absent a substantial justification, which is no more present here than it was in *Piper*.

There is no reason to think that if Ms. Friedman had stayed in Virginia, rather than moving to Maryland, she would have read the Virginia advance sheets more diligently, behaved more ethically, or volunteered more readily for *pro bono* assignments. Indeed, because she is working for and advising a Virginia company, her job will require her to render opinions on Virginia law and to represent her employer and its subsidiaries in Virginia courts. Those factors will provide more than enough incentive for her to keep up with changes in the law. She has also stated her willingness to undertake *pro bono* assignments or any other obligations that are required of members of the Virginia bar (J.A. 31-32). In short, there is simply no basis for challenging her competence, her commitment to Virginia, or her willingness to comply with Virginia's full time practice requirement because of the fact that when she leaves the office each night, she goes to a home in Maryland, rather than one in Virginia.

The same can be said not only of Ms. Friedman, but of other motion applicants who happen to live outside Virginia. *Piper* and *Frazier* rejected in very broad terms the notion that a lawyer's residence is a valid measure of his or her legal skills, ethics or dedication to the state where he or she proposes to earn a livelihood. If, for example, a Maryland lawyer has practiced law proficiently for several years and then seeks admission to the Virginia bar on motion, there is no reason to believe that his or her proficiency turns on whether the lawyer

lives in Maryland or Virginia. But even if one accepts appellants' basic proposition that, as a class, nonresident motion applicants pose special problems to the administration of justice in Virginia, that concern is addressed by the full time practice requirement in Rule 1A:1(d). Surely, if Virginia can insist that motion admittees must practice full time as a Virginia lawyer or face expulsion from the bar under Rule 1A:3, the site of that lawyer's home is irrelevant to any legitimate interest that Virginia has.

2. Appellants' Contentions that the Clause Does Not Apply Here Are Without Merit.

Appellants' principal response (at 13-21) is that neither *Piper* nor any of this Court's other Privileges and Immunities Clause cases applies here because the Clause protects only those applicants who are willing to take a bar examination. In their view, the opportunity to be admitted to a state bar on motion is not a "right" that is "fundamental" to promoting interstate harmony, and therefore a state may limit motion admissions to its own citizens without violating the Privileges and Immunities Clause. Relying on *Baldwin v. Montana Fish & Game Comm'n*, *supra*, 436 U.S. at 383, 388, and *Camden*, *supra*, 465 U.S. 271, they take the position that admission on motion is a "special dispensation," and "[s]o long as any applicant may gain admission to a State's bar, without regard to residence, by passing the bar examination, the principles underlying the privileges and immunities clause are satisfied." Brief for Appellants at 14, 21. This argument is flawed for a number of reasons.

First, if the Court should hold that Rule 1A:1(c) is subject to scrutiny under the Privileges and Immunities Clause, that does not mean, as appellants' first Question Presented and

first Argument suggest, that out-of-state residents will automatically be admitted to the Virginia bar. All that it means is that appellants must show that there is a substantial reason for excluding nonresidents from the motion admissions process, and even if the residence requirement is struck down, individual applicants must still satisfy any legitimate conditions imposed by the state.

Second, *Piper* cannot be read as narrowly as appellants wish. The case unequivocally states that "the opportunity to practice law should be considered a 'fundamental right'" which is protected by the Clause, 470 U.S. at 281, and *see* p. 13, *supra*. What appellants are really saying is that so long as a state offers nonresidents some means of obtaining a license to pursue their chosen profession, the state is free to discriminate against these applicants and to favor its own residents without limitation. That is not the law.

This Court has never held that the protections of the Clause are triggered only when a nonresident is completely excluded from pursuing his or her profession in a state. Indeed, some of the Court's leading cases on this subject have struck down state laws which did not exclude nonresidents, but simply charged them higher licensing fees. Illustrative are cases in which nonresidents were charged more money to obtain a commercial fishing license than state residents had to pay, *e.g.*, *Toomer v. Witsell*, *supra*; *Mullaney v. Anderson*, 342 U.S. 415 (1952), or in which a nonresident had to obtain a permit to do business in a state, while residents were excused from that obligation. *Ward v. Maryland*, *supra*.

The Privileges and Immunities Clause is considerably broader in scope than appellants concede. As this Court has observed, the Clause was intended to cure "the practice of some States denying to outlanders treatment that its citizens de-

manded for themselves." *Austin v. New Hampshire, supra*, 420 U.S. at 660. Indeed, "one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State." *Toomer v. Witsell, supra*, 334 U.S. at 396. Here, Virginia residents have "demanded for themselves" the option of being licensed without examination, and Ms. Friedman is not able to do business "on terms of substantial equality" with Virginia residents who are similarly situated. For lawyers in her position, this discriminatory treatment has important practical consequences.

Thus, if Ms. Friedman had remained a Virginia resident, all she would have to do to gain admission to the Virginia bar is fill out the requisite application forms, pay a fee of \$225 (J.A. 52), and then wait several months for the application to be approved.³ Because Ms. Friedman lives in Maryland, however, the process is more time-consuming and expensive in several respects.

First, the Virginia bar examination is administered only twice a year, whereas motion applicants can file their papers at any time. Second, Ms. Friedman would have to pay a \$325 fee to take the bar examination, whereas a motion applicant would pay only \$225. Third, she, along with almost every other examination applicant, would enroll in a bar review course. These review courses are not only costly, but also require an extensive commitment of time, which is a particular burden for an experienced lawyer trying to maintain a full time practice or

³The National Conference of Bar Examiners, which conducts character interviews for state licensing bodies, advises that its investigations of Virginia applicants are currently completed in 90 days, and we understand that motion applicants can be admitted to the Virginia bar in less than four months after filing an application.

job.⁴ Finally, after several months have been consumed in preparing for the examination, she must wait several additional months for the papers to be graded, the results to be announced, and the successful applicants to be sworn in. And of course, passing the examination is not a certainty, even for experienced lawyers.

The ability to gain admission to the bar on motion thus gives Virginia residents a decided advantage over equally qualified nonresidents, and the court of appeals correctly concluded that depriving nonresidents of this option "certainly imposes a burden on the practice of law" which is sufficient to trigger scrutiny under the Privileges and Immunities Clause (J.S. App. A8). As that court observed, the Rule's preference for Virginia residents over nonresidents may prevent lawyers who want to practice in Virginia, but who want to live in Maryland or Washington, from competing with members of the Virginia bar (*id.*). In addition, a nonresident deciding whether to take a legal job in Virginia is forced to choose between moving to Virginia or making an extensive commitment of time and money in order to take the Virginia bar examination. By steering lawyers towards buying a home in Virginia, the Rule operates in a protectionist manner "with the attendant adverse effect of disrupting interstate harmony" (J.S. App. A9)(footnote omitted).

The residence requirement can unfairly prejudice nonresidents in another way. From the standpoint of a Virginia law firm or employer, the motion admissions option may make a job applicant who lives in Virginia a more attractive candidate than an equally qualified nonresident. The Virginia resident

⁴For example, if Ms. Friedman loses this case, she will likely take a six-week review course which meets four nights a week for 3-14 hours nightly, plus another 7-1/2 hours each Saturday, at a cost of \$845.

can be licensed more quickly, can assume responsibility for litigation and other matters more quickly, and will not be distracted by having to prepare for and take a bar examination. In addition, unless the character investigation unearths a serious problem, it is a certainty that the application will be granted, whereas examination candidates always face the risk of failure.

Appellants make much of the fact that the motion admissions process is discretionary in nature, noting repeatedly that a number of states require all applicants to take an examination and waive that requirement for no one. Brief for Appellants at 8-10, 19-21. Their point seems to be that since Virginia could abolish Rule 1A:1 and make all applicants take the bar examination, it has considerable (if not total) discretion to decide when and for whom that condition should be waived.

The fact that a particular benefit is granted as a matter of discretion has not been a factor in this Court's Privileges and Immunities Clause cases. Indeed, decisions such as *Toomer* and *Mullaney*, where nonresidents were charged higher fees for commercial fishing licenses than were charged state residents, demonstrate that the Clause is routinely applied to laws which give state residents preferential access to certain resources or benefits, even though the state is under no obligation to make such access available to anyone.

Appellants' argument has also been rejected by this Court in cases involving unconstitutional conditions, of which Rule 1A:1(c) is a classic example, since it requires applicants such as Ms. Friedman to give up their constitutional right to live in the state of their choosing if they wish to take advantage of the preferred method for gaining a license to practice law in Virginia. The general rule was stated in a leading early case as follows:

[T]he state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.

Frost v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926). Thus, in *Speiser v. Randall*, 357 U.S. 513 (1957), this Court struck down a state law which granted property tax exemptions to only those veterans who were willing to sign a loyalty oath. Of *Speiser* the Court later explained:

While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of [constitutionally protected rights] and thereby threatened to "produce a result which the State could not command directly."

Sherbert v. Verner, 374 U.S. 398, 405 (1963), quoting *Speiser*, *supra*, 357, U.S. at 256. This principle has been followed in a number of settings involving various constitutional rights. *E.g.*, *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985)(due process right to a hearing); *Evitts v. Lucey*, 469 U.S. 387 (1985)(effective assistance of counsel); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)(freedom of speech); *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967)(right of self-incrimination); *Sherbert v. Verner*, *supra* (freedom of religion). See generally Westen, *The Rueful Rhetoric of "Rights,"* 33 U.C.L.A.L. Rev. 977 (1986).

Similarly, the fact that a state offers persons adversely affected by a discriminatory policy an alternate way of achieving their goal does not immunize that policy from scrutiny under

the applicable constitutional standard. For example, in *Piper*, nonresidents were allowed to practice law in New Hampshire on a *pro hac vice* basis, but that option did not save the rule or erase the fact that nonresidents were unfairly prejudiced by their exclusion from the state bar. 470 U.S. at 277 n.2. Cf. *Frazier v. Heebe*, *supra*, 107 S. Ct. at 2614.

The Court has taken a similar approach with respect to the existence of potential alternatives in an equal protection context. In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the Court struck down a statute barring a male applicant from attending an all-female nursing school. Although the applicant could have attended another state nursing school, the Court found that this option was insufficient to sustain the gender-based discrimination, inasmuch as the statute placed burdens on him that did not apply to women similarly situated. *Id.* at 723-24 n.8. See also *Harman v. Forssenius*, 380 U.S. 528, 540-42 (1965) (striking down poll tax even though statute gave voters an alternative means of voting without having to pay the tax).

Under appellants' argument, the fact that a state could abolish motion admissions entirely would permit it to limit admission on motion to members of a particular gender, ethnic group, religion, or political party, so long as it did not impose any such limitation on individuals who were willing to take the bar examination. Just as there is no basis for holding that a state is free to discriminate against motion applicants based on race, gender or similar factors, there is no basis for saying that a state can discriminate against applicants who live in another jurisdiction, simply because the state has the option of abolishing motion admissions entirely.

Nor, contrary to appellants' assertion (at 18), does *Frazier v. Heebe*, *supra*, support their claim that the protections of the Privileges and Immunities Clause are triggered only with

respect to nonresidents who are willing to take the bar examination. Appellants seize upon the Court's observation in *Frazier* that the nonresidents being excluded there had "passed the Louisiana bar examination," and they erroneously suggest that this fact was crucial to the outcome. 107 S. Ct. at 2612. The rule at issue in *Frazier* required members of the district court bar to be members of the Louisiana state bar, and it is true that Louisiana had no motion admission process. But there is nothing in this Court's opinion which suggests that the validity of the residence requirement in *Frazier* in any way turned on the means by which lawyers could gain admission to the Louisiana state bar.

The point being made in *Frazier* was that nonresidents had shown their competence to the same extent as Louisiana residents, which in that case required taking an examination. Here, Virginia has made a determination that lawyers licensed elsewhere for at least five years do not need to prove their competence by taking an examination. Having made that determination, Virginia may not assume that the only experienced attorneys entitled to this presumption of competence are those who agree to live in Virginia, unless the assumption can withstand the exacting scrutiny required by the Privileges and Immunities Clause.

Nor can appellants find any comfort in *Leis v. Flynt*, 439 U.S. 438 (1979), which they cite (at 20) for the proposition that a reviewing court should give substantial deference to conditions imposed on applicants to a state's bar who have alternative means of obtaining a license. But *Leis* merely upheld a state court ruling that nonresident lawyers who were not members of the state bar could be denied leave to appear *pro hac vice* in a particular case. After *Piper*, it is clear that *Leis* has no bearing whatsoever when a nonresident seeks general admission to a state bar and possesses the "same professional

and personal qualifications required of resident lawyers." *Piper, supra*, 470 U.S. at 284 n.16. Since Ms. Friedman is willing to do whatever Virginia requires of its own residents who qualify for admission on motion, *Leis* is irrelevant to this case.

Appellants' argument that the Privileges and Immunities Clause has no bearing here relies heavily on *Sestric v. Clark*, 765 F.2d 655 (7th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986), which was followed in *Sommermeier v. Supreme Court of Wyoming*, 659 F. Supp. 207 (D. Wyo. 1987), *appeal pending*, No. 87-1811 (10th Cir.) (awaiting argument). *Sestric* added in *dictum* that even if the Clause did apply, a residence requirement for motion applicants was valid, a point we answer at pp. 27-31, *infra*. At this time, we limit our discussion of *Sestric* to explaining why its holding that the Clause does not protect motion applicants is in error or at least inapplicable to this case.

Sestric upheld an Illinois rule requiring motion applicants to live in Illinois, reasoning that the rule benefitted only "new" Illinois residents and that it disadvantaged "old" Illinois residents and nonresidents alike; therefore, the court held, the rule did not involve discrimination based on state citizenship. 765 F.2d at 657-58. The flaw in that reasoning is that this Court has never held that the Privileges and Immunities Clause applies only when a state manages to craft a law which benefits only state residents and injures only nonresidents. Indeed, in *Camden*, this Court held that the Clause applied to a city ordinance which reserved public works jobs to city residents and denied them to both residents of other states, as well as to residents of every other community in the state: a state law is "not immune from court review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged." 465 U.S. at 218. Thus, under *Cam-*

den, the pertinent inquiry is whether state residents are the only people who can take advantage of a particular benefit, even if there are some state residents who fail to qualify. That is precisely this case.⁵

Appellants also cite *Sestric* for another proposition which warrants a brief response. *Sestric* expressed concern that striking down a residency requirement for motion applicants might impel some states to abolish the motion admission option and make all applicants take a bar examination. 765 F.2d at 665. Appellants echo that concern, noting that the number of states admitting lawyers on motion has declined over the past 20 years, although they give no reasons for those changes. Brief for Appellants at 8-9, 46-48. Yet the possibility that Virginia or some other state might take such action if the judgment here is affirmed has no bearing on whether this Rule is constitutional.

In cases alleging unconstitutional discrimination, a court decision invalidating the law in question gives a state two options: make the benefit available to everyone or to no one. We are aware of no case in which this Court has held that a reviewing court should try to predict what the state might do if the law

⁵Even if *Sestric* had correctly stated the law, the only way that the case would apply here is if there were some Virginia residents who could not be admitted on motion even if they met all the other requirements of Rule 1A:1. No such category exists. It is entirely possible for a lawyer to live in Virginia, to be licensed solely in a neighboring jurisdiction and to commute to work there while living in Virginia. If such an "old" Virginia resident sought admission to the Virginia bar on motion, he or she would stand on an equal footing with a "new" Virginia resident. Thus, in *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859 (4th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986), a 22-year resident of Virginia who practiced in the District of Columbia was denied admission to the Virginia bar under Rule 1A:1 because he was unwilling to satisfy the full time practice requirement and not because he had lived in Virginia for too long, or too short, a period of time.

is struck down, or that a constitutional ruling should depend, even in part, on a court's judgment that the benefit in question reflects sound public policy and should be retained, even if some people are excluded. Accordingly, any such speculation has no bearing on this case. *See also* pp. 43-44, *infra*.

* * *

In sum, Virginia's efforts to avoid scrutiny under the Privileges and Immunities Clause are to no avail. Ms. Friedman has done everything that Virginia requires of its own residents who seek admission to the bar on motion, but she was denied this opportunity solely because she lives in Maryland. Such discrimination is specifically forbidden under the Privileges and Immunities Clause absent a "substantial reason," and, as we now demonstrate, none exists here.

B. The Residence Requirement in This Rule Does Not Bear Substantial Relationship to the Goals Imputed to It.

Appellants concede (at 22) that if the Privileges and Immunities Clause applies to this case, there must be a "substantial reason" for the different treatment of nonresidents and a showing that the discrimination in question "bears a substantial relationship to the State's objectives," including an examination of whether "less restrictive means" are available to achieve that goal and whether nonresidents are a "peculiar source of the evil at which the statute is aimed." *See Piper*, *supra*, 470 U.S. at 284; *Camden*, *supra*, 465 U.S. at 222.

In defending Rule 1A:1(c), appellants do not claim that living in Virginia assures one's proficiency in the law, nor can they after *Piper*. Instead, they argue (at 26) that the Rule promotes two goals: first, "to provide a concrete demonstration of the untested applicant's commitment in fact to service to

the bar of Virginia and to Virginia clients," and second, "to facilitate compliance with, and the enforcement of, the full time practice requirement." In their view, the "evil" posed by non-resident motion applicants is that they "have made no commitment whatsoever to the administration of justice in the State, and are entitled to no presumption that they will willingly and actively participate in bar activities and obligations, or fulfill their public service responsibilities to the State's client community," particularly when they retain membership in another bar. Brief for Appellants at 26-27. As we now explain, Rule 1A:1(c) in no way helps achieve the goals attributed to it, nor are appellants justified in their wide-ranging indictment of multi-jurisdictional licensing or practice.

1. There Is No Basis for Questioning the Commitment of Motion Applicants to Virginia.

The flaw in appellants' "commitment" argument, as well as in decisions such as *Sestric* and *Sommermeier*, is the assumption that if an experienced lawyer seeks admission on motion, he or she is making "no personal investment in the jurisdiction" and must therefore be encumbered with some requirement which assures the requisite level of commitment. Brief for Appellants at 26 (emphasis added). There are two answers to this point.

First, the Court recognized in *Piper* that it is "unlikely," as a "practical matter," that a nonresident will seek admission to a state bar unless the lawyer has or anticipates "a considerable practice" in that state. 470 U.S. at 285. The Court reasoned that lawyers would naturally be concerned about providing quality service to clients and staying abreast of changes in local law, regardless of where they live; further, their interest in earning a livelihood in a community provides sufficient incentive to assure high ethical standards, even if they live elsewhere. *Id.* at 285-86.

That logic applies as well to motion applicants. Being licensed on motion may be less strenuous and costly than preparing for and taking a bar examination, but it requires personal investment and commitment nonetheless. Being admitted to the Virginia bar on motion also requires an initial outlay of \$225 and an annual expenditure thereafter of \$150 in dues to the Virginia State Bar, in addition to whatever dues a lawyer may be paying in another state. Lawyers admitted on motion, no less than lawyers admitted by examination, must also satisfy Virginia's continuing legal education requirements as well as those in effect in any other states where they practice. See Rules of the Supreme Court of Virginia, Pt. 6, § 4, ¶ 17. Thus, holding a license in more than one state, even one obtained through the motion admission process, requires an ongoing commitment of time and money. It is unlikely that a lawyer will make that commitment simply to hang another sheepskin on the office wall, regardless of where he or she lives.⁶

Second, even if a state may require motion applicants to satisfy some condition that is intended to demonstrate their commitment to serving the public, a residence requirement is not a valid measure, as this case illustrates. Ms. Friedman lived in Virginia for over eight years before she married and moved to Maryland (J.A. 38-39). She is the same person now

⁶Appellants note that when Ms. Friedman sought admission to the Virginia bar, she also sought admission to the Maryland bar, a fact which she disclosed when she filed her Virginia application and which was not seen as disqualifying her then (J.A. 36, 51-52). As Ms. Friedman explained in an affidavit, she applied to both bars simultaneously in order to reduce her cost and administrative burden and also to be available to represent her Virginia employer in litigation in Maryland (J.A. 58-60). Appellants cite this point to suggest that membership in several bars somehow threatens one's ability to satisfy Virginia's full time practice requirement, but motion admittees who live in Virginia are permitted to retain their memberships in other states' bars, and there is no basis for believing that Virginia residents are any less subject to alleged conflicts of loyalty than nonresidents. Brief for Appellants at 28 & n.10.

she was then, and there is no reason to believe that her willingness to honor professional commitments or her good faith plunged dramatically after she moved to Maryland. Indeed, she was admitted to the District of Columbia bar on motion and worked there for several years while living in Virginia, and there is nothing to suggest that her professional commitment to the District of Columbia was compromised because she went home to Virginia each night.

It would be one thing if the condition which Virginia sought to impose in order to assure an applicant's commitment had something to do with the practice of law, *e.g.*, making motion applicants take a special continuing legal education course, or giving them a temporary one-year license and reviewing their performance before the license is made permanent, or even requiring a three-hour practitioner's examination on local rules of practice, as Massachusetts and Maryland now do. As this Court recognized in *Piper*, however, the site on one's residence has nothing to do with one's commitment or competence. 470 U.S. at 285-87.

Appellants' brief also makes much of the fact that Virginia bar members are "expected" (but not required) to participate in various activities of the Virginia State Bar, as well as local bar associations, and they note that Virginia has established voluntary programs which provide *pro bono* services. Brief for Appellants at 31-32. Once again, *Piper* provides a complete answer. The Court there found it "reasonable to believe . . . that most lawyers who become members of a state bar will endeavor to perform their share of these services," but that a nonresident bar member, no less than resident members, "could be required to represent indigents and perhaps to participate in formal legal-aid work." 470 U.S. at 287 (footnote omitted).

Moreover, appellants' brief does not discuss the extent to

which Virginia bar members *in fact* participate in these activities, nor do appellants offer any evidence to show that living in Virginia somehow imbues a lawyer with a "spirit of public service" that is absent if one lives in Maryland or some other state. See Brief for Appellants at 29. Indeed, if Virginia were to open the motion admissions process to more lawyers, it would expand the pool of lawyers available to take part in bar activities, to the benefit of the bar associations and the citizens of Virginia alike. And if not enough lawyers were volunteering for such activities, Virginia could make participation mandatory for all members of its bar.⁷

In short, there is no substantial reason for discriminating against nonresidents based on amorphous concepts about their lack of "commitment," and appellants certainly have not shown that limiting motion admissions to Virginia residents "bears a substantial relationship" towards achieving that goal. *Piper, supra*, 470 U.S. at 284. But even beyond these arguments, there is a unique factor which is present here which is not present in cases such as *Sestric* and *Sommerneyer*: Virginia's fulltime practice rule, which provides a complete answer to appellants' "commitment" argument, as the court of appeals correctly concluded (J.S. App. A11).

Thus, Rule 1A:1 requires motion applicants to commit themselves not simply to a "considerable practice" in Virginia, see

⁷Indeed, if the act of living in Virginia promotes a lawyer's willingness to volunteer his or her services, then it would be logical for the Supreme Court of Virginia to abolish its full time practice requirement for motion applicants, which erects barriers to experienced lawyers who live in Virginia, but who practice in the District of Columbia or Maryland. At least some of those lawyers would be willing to represent individuals *pro bono* in their home community if they could be admitted to the Virginia bar on motion. However, they cannot justify taking the time away from their practice to study for and take a bar examination, nor are they willing to abandon their established practice and become full time Virginia practitioners, which is the only means by which they can avoid the examination requirement. See *Goldfarb v. Supreme Court of Virginia, supra*.

Piper, supra, 470 U.S. at 285, but to *full time* practice in Virginia. No other state which licenses lawyers on motion insists on such a requirement. Surely, if Virginia can impose such an onerous restriction and require motion applicants to fore-swear practicing law in any other state, appellants have no reason to doubt the "personal investment" or "commitment" these lawyers are making to Virginia. Accordingly, if the Court is not persuaded to apply the reasoning of *Piper* to motion applicants generally, the full time practice rule provides a ready answer to appellants' claims in this case, either by itself or in conjunction with the arguments made above.

2. A Residence Requirement Is Not Substantially Related to Assuring Compliance with the Full Time Practice Rule.

Appellants also argue that the residence requirement enhances compliance with the full time practice rule. According to Mr. Beach: "Apart from the Court's reliance on the good faith of an applicant's assertion" that he or she will comply with Rule 1A:1(d), or the receipt of a third party complaint that the Rule is being violated, "there is no other readily available or administratively feasible mechanism for monitoring or enforcing" the full time practice requirement (J.A. 26). He adds that requiring lawyers to live in Virginia "ensures that the demands of an out of state practice or residence in a distant location will not stand in the way of the applicant's becoming a proficient Virginia practitioner" (J.A. 27). Assuming that the full time practice rule is itself a valid condition to be imposed on motion applicants, this argument does not pass muster under *Piper*.⁸

⁸In *Goldfarb v. Supreme Court of Virginia, supra*, the Fourth Circuit upheld Virginia's full time practice rule against a challenge based on the Commerce and Due Process Clauses, and this Court denied *certiorari* with two Justices voting to grant review. In Part III of this Argument, we ex-

Appellants' brief asserts (at 34) that the full time practice rule requires motion applicants merely to "promise" at the time of their admission that they will practice full time in Virginia and that it requires no more than an applicant's "good faith" assertions of future compliance. But since Ms. Friedman made the same "promise" that Virginia demands of its own citizens, appellants' argument is little more than an assertion that Virginia does not trust the "good faith" of lawyers who live in other states. That is precisely the sort of parochialism that the Privileges and Immunities Clause is intended to root out. The court of appeals properly rejected the notion that Virginia residents are more honorable than residents of other states or that a Virginia resident "will be more truthful than a nonresident in stating his intention, or in carrying out his commitment, to practice full-time in Virginia" (J.S. App. A13).

Most lawyers take their professional commitments seriously and would not seek admission on motion unless they contemplated complying with Virginia's full time practice rule. Appellants contend, however (at 38), that the residence requirement is a "mutually reinforcing" companion to the full time practice rule. As part of this argument, they point out that they have adopted no formal method of enforcing the full time practice rule, and thus they use residence in Virginia as a convenient surrogate. But far from saving the residence rule, this argument only serves to underscore the imprecise way in

plain why Virginia's residence requirement violates the Commerce Clause; should the Court adopt this argument, a likely effect would be to nullify the full time practice rule upheld in *Goldfarb*. Even if the Court should conclude that Virginia's residence requirement is invalid under the Privileges and Immunities Clause, it would be difficult to square *Goldfarb* with such a holding, particularly in light of this Court's observations about the "mutually reinforcing relationship" between the Privileges and Immunities and Commerce Clauses. *Hicklin v. Orbeck*, *supra*, 437 U.S. at 531.

which the residence requirement works to achieve its asserted goals.

The residence requirement is plainly overinclusive in that it applies to individuals such as Ms. Friedman, who are working full time in Virginia and who do not (and in some instances cannot) engage in a law practice outside Virginia. The requirement is also underinclusive since it simply assumes that anyone who lives in Virginia will continue to practice there on a full-time basis, despite the opportunities for full or part time practice in neighboring jurisdictions.⁹

Moreover, as the court of appeals noted, there are less restrictive and more effective ways to promote compliance with the full time practice rule short of penalizing all out-of-state residents, for example, by requiring all motion admittees to certify annually that they are still in compliance with Rule 1A:1 (J.S. App. A13). In reply, appellants protest (at 38) that such a requirement would provide no assurance that lawyers would respond truthfully to such an inquiry and might use sham offices in order to evade the rule. Of course, as the court of appeals pointed out, lawyers who want to evade the residence requirement may establish a sham residence in Virginia as easily as they may evade the full time practice rule by establishing a sham office in Virginia (J.S. App. A14). Thus, the only basis for believing that the latter kind of fraud is more likely to occur than the former is if one assumes that Virginia residents are more truthful than nonresidents, an assumption which the

⁹Indeed, it is doubtful that the residence requirement plays any role in assuring compliance with the full time practice rule, or *vice versa*, for the record indicates that *neither* rule is being enforced. Appellants filed with their stay papers a November 1986 newspaper story in which the Virginia Bar Counsel stated that during his nine years in office, he had never seen a disciplinary case involving Rule 1A:1(c) and only one case involving Rule 1A:1(d), which involved other disciplinary matters as well (J.A. 20-21).

district court dismissed as a "provincialism we cannot indulge" (J.A. 13).

Under the circumstances, the Court should not credit appellants' claims that the residence requirement somehow "insulates" motion admittees from practicing law in other states or prevents "chicanery." Brief for Appellants at 36, 41. But even if motion admittees did engage in a multi-jurisdictional practice, experience suggests that this sort of practice is not an evil which a state must prevent at all costs. The full time practice requirement is unique to Virginia; the 22 other jurisdictions which admit lawyers on motion are content to let motion admittees practice in more than one state, as are the eight states which administer only a shorter attorneys' examination. Brief for Appellants at 9 & nn. 3, 5.

Moreover, there has been a trend towards greater uniformity of substantive and procedural law in recent years. Hafter, *Towards the Multistate Practice of Law Through Admission by Reciprocity*, 53 Miss. L.J. 1, 9 (1983). Also, the degree to which lawyer proficiency is tested by a bar examination has become more standardized. At present, 46 states, three territories and the District of Columbia administer the Multistate Bar Examination, a multiple-choice examination covering several subjects, as part of their own bar examination. *Multistate Bar Examination Statistics*, 56 Bar Examiner, No. 2, at 18-19 (1987).

Additionally, the practice of law has become increasingly specialized. Many lawyers, particularly those who have practiced for the minimum five year period required of motion applicants in Virginia, have at least begun to develop a certain expertise in some area of the law. If they are called upon to use that expertise on behalf of clients in more than one state, they can likely do so quite competently without the need to prove themselves by taking additional full-length bar examina-

tions or submitting to restrictions of the sort set out in Rule 1A:1. The point was eloquently made by Chesterfield Smith, a former president of the American Bar Association:

Admission to the bar in another state through a general bar examination becomes increasingly difficult for the proficient, older lawyer who wants only a limited practice in an additional state, or who because of client demand wants to practice in multiple states, or who wants to migrate to a state where the demand for practitioners in a particular branch of the law is large, or who wants to associate with a law firm with lawyers from other states and offer firm-wide, multioffice service to clients in several states, or who simply made a geographical mistake in selecting a state in which to practice. The better a lawyer is in one branch of the law, the more specialized in a particular area of the law practice, the greater the lawyer's difficulty in gaining admission through a general bar examination.

Smith, *Time for a National Practice of Law Act*, 64 A.B.A.J. 557, 558 (1978). See also Hafter, *supra*, 53 Miss. L.J. 1 (urging uniform standard for state bar admissions by reciprocity).

The courts below were thus correct in holding that Rule 1A:1(c) is invalid under the Privileges and Immunities Clause when, as here, a nonresident makes the same commitments which the Rule demands of qualified state residents. While we believe the Court should affirm the judgment on this ground, affirmance is also required under both the Equal Protection and Commerce Clauses for reasons we now explain.

II. THE RESIDENCE REQUIREMENT FOR MOTION APPLICANTS VIOLATES THE EQUAL PROTECTION CLAUSE.

This Court has made it clear that when "a state distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Generally, a law will survive that scrutiny if the distinction rationally furthers a legitimate state purpose." *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) (footnote omitted). In recent Terms, this Court has invalidated several state laws which advantaged residents over nonresidents, even though it used a "rational basis" standard of review that is more deferential to the state than the one employed in cases under the Privileges and Immunities Clause. Since Rule 1A:1(c) operates in the same discriminatory manner as the laws in these cases, it too is invalid under the Equal Protection Clause.

For example, *Williams v. Vermont*, 472 U.S. 14 (1985), involved a tax which Vermont imposed when cars are registered there. Vermont residents received a credit on this tax if they had purchased the car in another state and paid a sales tax there. However, individuals who were not Vermont residents when they bought their cars were not eligible for that credit if they later moved to Vermont and registered their cars there. The Court rejected the state's arguments that this disparate approach furthered such interests as making users of the state highways pay for their upkeep, or enabling Vermont residents to shop outside the state without economic penalty, finding that the distinctions drawn between residents and nonresidents had no relation to the asserted purposes. *Id.* at 21-27.

In *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985), the Court struck down another tax which sought to "give[] the 'home team' an advantage" by taxing out-of-state

insurance companies at a higher rate than in-state companies. The Court emphasized that "a State may not constitutionally favor its own residents by taxing foreign corporations at a higher rate solely because of their residence . . ." *Id.* And in *Hooper v. Bernalillo County Assessor*, *supra*, the Court struck down a New Mexico law which granted Vietnam veterans a tax exemption if they lived in the state prior to 1976, but not if they moved into the state afterwards, finding there was no valid reason for making that distinction between "old" and "new" residents.

The residence requirement in Rule 1A:1(c) operates in much the same way as the laws in these cases. As in *Williams v. Vermont*, Virginia gives its residents an exemption from an examination requirement that it could impose on all applicants; as in *Metropolitan Life*, Virginia places the burden of taking a bar examination on nonresidents, but not on similarly situated residents. The facts here show that the discrimination effected by Rule 1A:1(c) is no less irrational than the discrimination in those cases. If, after their marriage, Ms. Friedman and her husband had lived at her home in Virginia, she could have been admitted to the Virginia bar on motion. Indeed, even if they lived together in Virginia without getting married, she could still have been admitted on motion. See *Cord v. Gibb*, 219 Va. 1019, 254 S.E.2d 71 (1979). In effect, the only reason why Virginia requires her to take its bar examination is that she moved into her husband's house in Maryland rather than remaining in her home in Virginia.

While *Williams*, *Metropolitan Life* and *Hooper* involved discriminatory taxes, that distinction has no significance. Indeed, this Court's willingness to invalidate those laws bolsters our argument, since the Court has repeatedly stressed that "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems

of taxation,'" and it "has been reluctant to interfere with legislative policy decisions in this area." *Williams v. Vermont*, *supra*, 472 U.S. at 22, quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 (1973).

The district court rejected Ms. Friedman's equal protection challenge on the basis of *Brown v. Supreme Court of Virginia*, 359 F. Supp. 549 (E.D. Va.) (three-judge court), *aff'd mem.*, 414 U.S. 1034 (1973) (J.A. 12), where this Court summarily affirmed a judgment upholding Rule 1A:1(c) against a challenge based on a "right to travel" theory, *see Shapiro v. Thompson*, 394 U.S. 618 (1969). Ms. Friedman is making no such argument here, and in any event, the summary affirmance in *Brown* in no way precludes the Court from giving plenary consideration to the arguments she is making in this case. *See Bowers v. Hardwick*, 106 S. Ct. 2841, 2843 n.4 (1986); *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975); *Washington v. Yakima Indian Nation*, 439 U.S. 463, 477-78 n.20 (1979). And once such consideration is given, the Court's recent Equal Protection cases require that Rule 1A:1(c) be invalidated under this Clause as well.

III. THE RESIDENCE REQUIREMENT FOR MOTION APPLICANTS VIOLATES THE COMMERCE CLAUSE.

The Commerce Clause of the Constitution (Art. I, § 8, cl. 3) reflects the "principle that our economic unit is the Nation" and that "states are not separable economic units." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 537-38 (1949). Mindful of this principle, this Court has shown "an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." *City*

of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978). And whatever the law may once have been, there is no longer any dispute that the practice of law is a matter that is covered by the Commerce Clause. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

This Court has adopted two tests for assessing challenges to state laws under the Commerce Clause, but under either of them, the residence requirement cannot survive. Under the first, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a State's borders." *City of Philadelphia v. New Jersey*, *supra*, 437 U.S. at 624. It does not matter whether the purpose of the state law is to exclude out-of-state interests, or whether exclusion is simply the result. "The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980), citing *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 & n.15 (1981).

Here, the "practical operation" of the residence requirement is to exclude out-of-state attorneys from the Virginia bar in a manner similar to cases which conditioned a company's doing business in the state upon having an office or other facility in that state. Illustrative is the leading case of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), which struck down an Arizona law requiring all Arizona cantaloupes be packed at a plant in that state. Arizona defended its law as promoting the reputation of Arizona growers, a purpose this Court termed "surely legitimate." *Id.* at 143. Nonetheless, the statute was struck down under the "virtually *per se* illegal" test because

it required "business operations to be performed in the home state that could more efficiently be performed elsewhere." *Id.* at 145. *Accord, South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984) (striking down Alaska law that required timber companies to have log processing plant in state in order to bid on timber sold from state lands); *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977) (striking down state law limiting importation of Washington apples into North Carolina); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (striking down Mississippi law blocking milk from other states unless they accept Mississippi milk on a reciprocal basis); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (invalidating law forbidding sale of milk not pasteurized and bottled within five miles of town).

Apart from the "virtually *per se* illegal" test, the Court has set out an alternative approach which is more flexible, though still demanding. If a state "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, *supra*, 397 U.S. at 142. "If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.* Under this analysis, the "burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interest at stake." *Hunt v. Washington Apple Advertising Comm'n*, *supra*, 432 U.S. at 353; *see also Hughes v. Oklahoma*, *supra*, 441 U.S. at 336.

Under either standard, the residence requirement in Rule 1A:1(c) cannot stand. The Rule favors Virginia residents at the expense of experienced, competent lawyers who want a license to practice their profession in Virginia, but who cannot do so unless they either take a bar examination or move their homes to Virginia. The Rule is thus functionally the same as state laws which favor in-state corporations by requiring out-of-state corporations to build a plant or other facility in the state as a condition of doing business there. For the reasons advanced in the Privileges and Immunities Clause portion of this Argument, there is no reason to believe that this residence requirement achieves any "putative local benefit," and it has an undeniably discriminatory effect on residents of other states.¹⁰

The district court rejected this argument, considering itself bound by the Fourth Circuit's decision in *Goldfarb v. Supreme Court of Virginia*, *supra* (J.A. 12), and the court of appeals did not address the point in light of its holding under the Privileges and Immunities Clause. *Goldfarb* involved a challenge to the full time practice rule by a long-time Virginia resident who practiced law in the District of Columbia and who wished to divide his practice between his Washington office and an office near his home in Alexandria. When his application for admission to the Virginia bar under Rule 1A:1 was denied because he did not intend to close his Washington office, he filed suit under the Commerce and Due Process Clauses.

¹⁰*Piper* quoted with approval the comment of a former president of the American Bar Association, who said: "Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition." Smith, *supra*, 64 A.B.A.J. at 557, quoted at 470 U.S. at 285 n.18. *Accord, Hafter*, *supra*, 53 Miss. L.J. at 9.

In upholding dismissal of his suit, the Fourth Circuit reasoned that Rule 1A:1 enhanced interstate mobility because it made it easier for lawyers to relocate their practice to Virginia. The court noted that since Virginia could make everyone take a bar examination, it could "hardly be penalized" for offering a less onerous alternative. 766 F.2d at 863. The court dismissed out of hand the applicant's claim that the full time practice requirement was an unconstitutional condition, stating that the "constitutionality of state programs that condition eligibility on various grounds is an enormously complex congeries of subjects," but declined to explain why Rule 1A:1(d) was not subject to that doctrine. *Id.* at 864. The court also expressed concern that a ruling in favor of the applicant might prompt Virginia to abolish motion admissions entirely, thus threatening interstate mobility for those lawyers who could satisfy the standards of the Rule. *Id.* at 863.

The reasoning in *Goldfarb* is seriously flawed. There is no basis for dismissing an unconstitutional condition argument on the theory that this doctrine does not apply to Commerce Clause litigation. "There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. Engaging in interstate commerce is one." *Garrity v. New Jersey*, *supra*, 385 U.S. at 500; see also *Western & Southern Life Ins. Co. v. Board of Equalization*, 451 U.S. 648, 663 n.14 (1981). Indeed, the reasoning in *Goldfarb* is particularly ironic since this Court's early unconstitutional conditions cases usually involved state laws which imposed discriminatory burdens on out-of-state firms seeking a license to do business in the state, with the restrictions defended under the theory that the license was being dispensed in the exercise of the state's discretion. *E.g.*, *Hanover Fire Ins. Co. v. Harding*, 272 U.S. 494, 507-08 (1926).

That the approach taken in *Goldfarb* is invalid is illustrated

by *South-Central Timber Development, Inc. v. Wunnicke*, *supra*, where Alaska decided to sell timber from state lands only to those bidders who at least partially processed the logs in Alaska. This action favored those bidders that had an in-state processing plant, while disfavoring companies which sold unprocessed logs. This Court's plurality opinion held that the in-state plant requirement was *per se* illegal under the Commerce Clause.

The parallels between *South-Central Timber* and *Goldfarb* are striking. Just as Virginia has no duty to admit lawyers on motion, Alaska had no duty to confer a benefit on any private firm by auctioning off its timber. Having decided to confer such a gratuitous benefit, however, the Commerce Clause did not allow Alaska to condition one's eligibility in a way that favored companies with facilities in Alaska over companies which lack such facilities, any more than the Clause allows Virginia to limit the benefit of motion admission to local lawyers or to those who agree to practice in Virginia on a full time basis. To be sure, Alaska was free to respond to the *South-Central Timber* decision by deciding that it would auction its timber off to no one, just as Virginia is free to respond to a decision affirming the judgment below (or a ruling that the full time practice rule is invalid) by eliminating motion admissions entirely.

In deciding *South-Central Timber*, this Court was not deterred by the fact that Alaska might respond in such a fashion to an adverse ruling. Nor did it express concern about the effects that such a move might have on interstate commerce or on those companies that previously qualified for the benefit in question. By contrast, a principal reason why the full time practice rule was upheld in *Goldfarb* was the court's concern that a negative ruling might end motion admissions in Virginia, a result which the court deemed undesirable for those applicants fortunate enough to qualify under the Rule, but which,

under *South-Central Timber*, it should not have considered in reaching its decision. 766 F.2d at 863.

This result-oriented approach, based on judges' predictions about the possible response to their rulings and their views on whether that response would result in sound public policy, finds no support in any of this Court's decisions examining discriminatory laws or conditions (*see pp. 25-26, supra*). Thus, *Goldfarb* provides no reason for concluding that the residence requirement in Rule 1A:1(c) is valid under the Commerce Clause. Because that Rule discriminates against out-of-state lawyers in the same manner as the the state laws discussed in this section, it should be struck down under the Commerce Clause as well.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 87-399

**SUPREME COURT OF VIRGINIA
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**In The
Supreme Court of the United States**

October Term, 1987

—o—
**SUPREME COURT OF VIRGINIA, and
its Clerk, DAVID B. BEACH,**

Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

—o—
**On Appeal From the United States
Court of Appeals for the Fourth Circuit**

—o—
APPELLANTS' REPLY BRIEF

—o—
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APPELLANTS' REPLY BRIEF

Appellants, the Supreme Court of Virginia and its Clerk, David B. Beach, submit this reply brief to address the Commerce Clause and Equal Protection claims made by the appellee, Myrna E. Friedman, which were not addressed by the court of appeals or in appellants' opening brief.

ARGUMENT

I. Virginia's Residence Requirement For Admission Without Examination Does Not Violate The Commerce Clause Because There Is No Basis For Concluding That The Requirement Imposes An Unreasonable Burden On Interstate Commerce.

Article I, Section 8 of the Constitution limits the power of a State to create unreasonable barriers against interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979). As with the Privilege and Immunities Clause, this limitation on the exercise of power by a State to regulate matters of "legitimate local concern" is not absolute, even though interstate commerce may be affected by such regulation. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980).

Furthermore, although this Court has recognized that certain aspects of the practice of law constitute "commerce" or "commercial activity," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 778 (1975), the Court has also confirmed that there are non-commercial aspects of the practice of law which distinguish it from purely commercial activity, and indeed has stated that the practice of law should not be viewed "as interchangeable with other business activities." *Goldfarb*, 421 U.S. at 778 n. 17. More importantly, this Court in *Goldfarb* made clear that nothing in its decision limited "the authority of a state to regulate its professions," noting that the "[i]nterest of the State in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice." *Id.* at 792-93. The Court reiterated this principle in *Bates v. State Bar of Arizona*,

433 U.S. 350, 361 (1977): "The regulation of the bar is at the core of the State's power to protect the public." Thus, for purposes of Commerce Clause analysis, a State court's regulation of admissions to a State's bar is unquestionably a matter of legitimate local concern.

This Court has articulated two tests for examining the validity of a State law challenged as violating the Commerce Clause. First, under the "outright protectionism" test, "[t]he Court has observed that 'where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.'" *Lewis v. BT Investment Managers, Inc.*, *supra*, at 36, quoting from *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 (1978). "A court may find that a state law constitutes 'economic protectionism' on proof either of discriminatory effect, or of discriminatory purpose." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n. 15 (1981).

This Court's decisions also have made clear, however, that a state law is not discriminatory although it affects articles of commerce so long as "there is some reason, apart from their origin, to treat them differently." *Lewis v. BT Investment Managers, Inc.*, *supra*, at 36; *City of Philadelphia v. New Jersey*, *supra*, at 626-27 (1978) (emphasis added). In this case, it is apparent that the residence requirement for admission without examination is not directed to any particular attorney because he or she is from out of state, and there is not one fragment of evidence in the record to suggest such an intention. Rather, the stated purpose of Virginia's bar admission regulatory framework is to ensure that Virginia clients are

served by knowledgeable lawyers who are committed to serving Virginia clients and improving the legal system in Virginia. An experienced attorney seeking admission to the Virginia bar may satisfy this required showing of competence and commitment in one of two ways. The applicant may take and pass the Virginia bar examination, which serves as an immediate or *short term* demonstration of the applicant's intention or commitment to maintain a substantial practice and serve the administration of justice in the state, and also establishes by an objective measure the applicant's knowledge and competence in Virginia law and procedure. In lieu of the bar examination, an attorney applicant may make the required showing of competence and commitment through the *long term* process defined by Rule 1A:1, i.e., by residing and practicing full time in the State. Residence confirms the applicant's commitment to, or personal investment in, the Virginia legal system, and facilitates adherence to the full time practice restriction, all of which ensures the applicant's frequent exposure to Virginia law and practice. Thus, the residency component of the rule is addressed only to those attorneys who choose not to demonstrate otherwise, i.e., by taking and passing the bar examination, a commitment of service to the bar of Virginia, and the assurance that they will become proficient in Virginia law and practice. It is for this reason, and not because of their origin, that the rule implicates nonresident attorneys. Accordingly, there is no purposeful discrimination, and no *per se* violation as a matter of law.

Appellee also argues in her brief that the "'practical operation' of the residence requirement is to exclude out-of-state attorneys from the Virginia bar . . ."

(p. 39). This is simply not true. There is nothing to prevent the appellee from maintaining her residence in Maryland while practicing freely in the courts of Virginia. She has an alternative available to her which will permit her to achieve that result, and that is simply taking and passing the bar examination. There were no similar alternatives available to the complainants in the Commerce Clause cases cited in appellee's brief. Thus, in *South Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984), the "primary manufacture within Alaska" requirement was an absolute prerequisite to the purchase of low priced Alaskan timber. Absent compliance with the in-state processing requirement, the complainant was prohibited from purchasing the low priced Alaskan wood. There is no such absolute bar in this case. Similarly, in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), Arizona law required all Arizona cantaloupes to be packed at a plant in that State. Absent compliance, the complainant was prohibited from shipping them beyond state lines. There is no such absolute prohibition in this case.¹

¹See also *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (absolute prohibition on importation of solid or liquid wastes into New Jersey with no alternatives to accomplish the same result); *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977) (North Carolina law permitted importation of apples only if containers bore USDA grading system; effectively barred Washington state apples which bore that state's grading system); *Great Atlantic and Pacific Tea Company v. Cottrell*, 424 U.S. 366 (1976) (Mississippi law absolutely prohibited importation of milk from other states unless those states accepted Mississippi milk on a reciprocal basis); *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (local ordinance absolutely prohibited sale of milk not pasteurized and bottled within five miles of town).

Indeed, if the Court were to hold that the rule is *per se* invalid simply because it affects out-of-state attorneys, then no *reciprocal* admission requirement (which necessarily applies only to foreign attorneys) could ever survive analysis under the Commerce Clause. The "practical effect" of such a result would be either the ordination of a national bar, or more likely, the requirement of a bar examination for all. Clearly, the Commerce Clause requires neither result.

Appellee also contends that residence for admission without examination violates the second, less stringent test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under this test:

"Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree, and the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

Lewis, supra, at 36-37, quoting from *Pike v. Bruce Church, Inc., supra* at 142. Applying this standard to the case at bar, it is clear that Virginia's bar admission program operates in an evenhanded manner to effectuate a legitimate, if not compelling, local interest. The record in this case establishes that 91% of all Virginia residents who seek admission to the Virginia bar must take the Virginia bar examination (J.A. 54, 55). This number includes not

only recent law school graduates, but also experienced attorneys who have less than five years practice in another state; experienced attorneys with more than five years of practice but who come from states which do not provide for reciprocal admissions; and experienced attorneys who are not willing to comply with the full time practice requirement. Thus, most resident bar applicants, like non-resident bar applicants, must take and pass the Virginia bar examination in order to gain admission. The examination is waived only for the small number of experienced attorney applicants who are willing to comply with Virginia's "long term" process for demonstrating a commitment to the bar and competence in local law, i.e., by residing and practicing full time in the State. Clearly, any burden on interstate commerce occasioned by Virginia's reciprocity admission requirements must be regarded as incidental, especially when balanced against the importance of the State interests involved, and when viewed in conjunction with the "short term" process of admission by examination.

For similar reasons, appellee's "unconstitutional condition" argument also is fatally flawed. The availability of the bar examination is the factor which distinguishes this case from *South-Central Timber Development, Inc. v. Wunnicke, supra*, cited in appellee's brief in support of her unconstitutional condition contention. The ultimate benefit sought to be attained in this case is the opportunity to practice law as a member of the Virginia bar, whereas in *Wunnicke*, the ultimate benefit sought was the opportunity to purchase low price Alaskan timber. Here, the out-of-state applicant may attain the benefit of Vir-

ginia bar membership by taking and passing examination. In *Wunnicke*, there was *no means* by which the out-of-state processor could attain the benefit of purchasing low priced timber. The in-state processing requirement was an "unconstitutional condition" in that it was an insurmountable barrier to the enjoyment of the benefit. There is no such insurmountable barrier in this case which prevents the appellee from practicing law in Virginia. And while Alaska may have been free to shut down its timber business and sell to no one, Virginia cannot dismantle its state bar and decree an end to the practice of law in the Commonwealth.

Appellee's unconstitutional condition example illustrates the fallacy of her attempt to color match the facts of this case to the reasoning of Commerce Clause cases involving packing cantaloupes, shipping apples and cutting timber. Her attempt to isolate and view in a vacuum one aspect of Virginia's reciprocity admission policy without regard to the Commonwealth's bar admission program as a whole is misleading. The express purpose of Virginia's rule allowing admission without examination, in addition to ensuring competence and a commitment in fact among untested attorneys, is "to promote interstate mobility among providers of professional legal services." (J.A. 25). While the bar examination is a condition for admission to the bar imposed on residents and nonresidents alike, the waiver of the bar examination for a limited class of practitioners actually makes it easier for lawyers to change states. Thus, far from placing an unreasonable burden on the interstate mobility of lawyers, the Virginia bar admission program actually enhances that mobility.

The real thrust of appellee's arguments, and that of amici who have filed in favor of appellee's position, is that States should be denied the authority to place *any* restrictions or conditions upon admission without examination. They argue for a constitutionally mandated national bar, whereby admission to one State's bar is admission to all. Residence for admission in lieu of examination is attacked in this case today, and appellee has made clear that full time practice will be challenged again. The requirement of *reciprocity* among the remaining reciprocal states surely will be litigated, and the five years of active practice requirement may be attacked next as arbitrary and unnecessary. The prospect of such litigation challenging the States' tools for regulating the quality of their bars is the principal cause for the large number of States which have abandoned reciprocity altogether, and the number of States abolishing reciprocity continues to increase, even as this case proceeds to argument.²

Appellee argues that no consideration should be given by this Court to the likelihood that even more States will abandon reciprocity admissions if conditions on reciprocal admissions are ruled unconstitutional. This argument ignores the unfolding facts and runs contrary to the purpose of the Constitutional provisions governing relations among the several States. Appellants submit that the decline of

²On December 18, 1987, the Wyoming Supreme Court entered an order, effective March 15, 1988, amending Rule 5 of the Rules of the Supreme Court of Wyoming, eliminating admission to the Wyoming bar without examination. After the effective date, all applicants will be required to take the regular Wyoming bar examination. Twenty-nine states now provide no form of reciprocity admission.

interstate mobility through the elimination of bar admission by reciprocity is a development which the Commerce Clause, and indeed the Privileges and Immunities Clause, should be construed to protect against. In any event, the States and the lower federal courts are in need of guidance regarding the appropriate Constitutional limitations and standards governing the States' power to establish conditions for discretionary admission to the bar. The better approach would encourage rather than inhibit reciprocity procedures. Appellants submit this Court should announce a general principle that admission without examination requirements are valid so long as they do not tread upon fundamental rights or invidiously discriminate upon some suspect criterion. Commerce Clause or Privileges and Immunities considerations have no connection to discretionary admission without examination. Those interests are satisfied by the right of all persons, within and without the State, to gain admission to a State's bar by passing its bar examination.

For all these reasons, appellants submit that Rule 1A:1(c) of the Rules of the Supreme Court of Virginia does not violate the Commerce Clause.

II. Virginia's Residence Requirement For Admission Without Examination Does Not Violate The Equal Protection Clause Because It Is Rationally Related To Virginia's Legitimate Interest In Maintaining A Knowledgeable Bar Which Is Committed To Serving And Improving The Legal System In Virginia.

Appellee's equal protection argument has already been litigated and put to rest in *Brown v. Supreme Court*

of Virginia, 414 U.S. 1034 (1973) *summarily aff'g*, 359 F.Supp. 549 (E.D. Va.). Contrary to the assertions in appellee's brief (p. 38), *Brown* was not solely a "right to travel" case. In considering a nonresident's challenge to Rule 1A:1(c) there, the court concluded that Virginia acted "rationally and with a compelling state interest" in requiring an attorney seeking admission without examination "to reside permanently in Virginia and devote his full time to the practice of law therein." *Brown, supra*, 359 F. Supp. at 561, *aff'd mem.*, 414 U.S. 1034 (1973). This issue also was addressed by the United States Court of Appeals for the Seventh Circuit in *Sestric v. Clark*, 755 F.2d 655 (7th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986), which stated "we do not think that the equal protection clause ordains in effect a national bar, whereby admission to one state's bar is admission to every other's." *Sestric, supra*, 765 F.2d at 663.

Appellee's reliance on recent tax cases to support her argument that Rule 1A:1(c) violates Equal Protection is likewise without merit. Those cases examined the results achieved by a State's classification to determine if they were related to the State's proffered objectives, and in all cases found that a rational relationship or a legitimate State interest did not exist. Thus, in *Williams v. Vermont*, 472 U.S. 14 (1985), this Court struck down a use tax exemption which excluded, and therefore imposed a tax burden, solely on new residents. The Court found that the State's rationale for the use tax (i.e., to reach out-of-state purchases by Vermont residents) had no application to purchases made by persons who were not residents of Vermont at the time they made the purchase. Likewise, in

Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985), the Court struck down a New Mexico tax exemption provided for Vietnam Veterans, but only if they had lived in the state before 1976. The Court found that the legislative classification bore no rational relationship to one of the State's objectives—to encourage Vietnam Veterans to move to New Mexico. And in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) the Court struck down Alabama's "domestic preference" tax which had, as its express legislative purpose, to promote domestic business over foreign competitors. This was not, the Court concluded, a legitimate State interest.

It is clear that the reasoning of these cases has no application to the case at bar. There is not one fragment of evidence in this case, or in the whole history of the Virginia Supreme Court's regulation of the practice of law in Virginia, which provides even the remotest inference that Virginia's reciprocity rule for admission without examination is intended, or has the effect, of protecting Virginia lawyers. The uncontroverted purpose of Virginia's requirement of residence for admission to the bar without examination is to supplant the assurances of commitment to the bar and competence in local law otherwise provided by the bar examination. Residence achieves the objective of commitment to the bar because it requires the untested applicant to make a personal investment in the jurisdiction and in the Virginia legal system. Residence supports the objective of proficiency in Virginia law because it insulates the untested applicant from the demands of a former or developing out-of-state practice. There can be no doubt that these objectives, in theory and

in practice, are rationally related to Virginia's compelling interest in regulating the practice of law, and in protecting the consumers of legal services in this Commonwealth. That is all the justification the Equal Protection Clause requires. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1971).

CONCLUSION

For the reasons stated, neither the Commerce Clause nor the Equal Protection Clause provides an independent and sufficient ground for affirmance. The Supreme Court of Virginia and its Clerk urge the Court to reverse the judgment of the court of appeals below.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

SUPREME COURT OF VIRGINIA, *et al.*,
Defendants/Appellants,

v.

MYRNA E. FRIEDMAN,
Plaintiff/Appellee.

On Appeal from the United States
Court of Appeals for the Fourth Circuit

BRIEF OF THE
AMERICAN CORPORATE COUNSEL ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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v.

MYRNA E. FRIEDMAN,
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**On Appeal from the United States
 Court of Appeals for the Fourth Circuit**

**BRIEF OF THE
 AMERICAN CORPORATE COUNSEL ASSOCIATION
 AS AMICUS CURIAE IN SUPPORT OF APPELLEE**

 This brief is filed on behalf of the American Corporate Counsel Association in support of Appellee, Myrna E. Friedman. Consent from counsel for both parties has been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Amicus Curiae, the American Corporate Counsel Association ("ACCA"), is composed of members of the bar who do not hold themselves out to the public for the practice of law and who are engaged in the active practice of law as employees of corporations and other organizations in the private sector. ACCA is the only national bar association whose efforts are devoted exclu-

sively to the professional needs of attorneys who are members of the legal staffs of organizations in the private sector. ACCA has over 7,000 members who are employed as corporate counsel by some 3,500 organizations across the United States and in several foreign countries.

ACCA seeks to promote rules and procedures concerning access and admission to practices so that corporate counsel can adequately manage corporate legal affairs consistent with bar authorities' and ACCA's interest in maintaining high standards of competence. The question of a lawyer's residency in a state as a qualification for admission by motion to that state's bar is of great concern and importance to the members of the ACCA and the clients they serve, because it affects the ability of corporate counsel to represent effectively their clients in the states which have such requirements for admission.

These rules particularly affect corporate counsel who, due to the nature of their practice, are often required to handle matters in several state and federal jurisdictions. These unnecessary and restrictive rules force corporate clients to provide time and incur expenses to have their attorneys study and take several bar exams; have their attorneys pursue a course of limited admissions to handle litigation matters through *pro hac vice* application; or hire local counsel. Such a result is a wasteful expenditure of corporate resources without providing the client, the court, or the public with an overriding benefit.

In addition, ACCA members as attorneys have an interest in ensuring that restrictions to practice serve the public interest and are not imposed for illegitimate objectives.

Because of the impact of bar admission restrictions on its members, ACCA has, during the past year, undertaken an examination of the current bar admissions system. This examination has consisted of both a study conducted for the association by the American Bar Foun-

dation,¹ and a symposium held in conjunction with the New York University School of Law and the American Bar Association.² The information ACCA has developed can assist the Court in evaluating the legitimacy not only of Virginia's residency requirement for admission on motion but of other state bar admission restrictions.

ACCA has always supported efforts to ensure that *all* attorneys attain and maintain a high level of legal proficiency in line with the public's expectation of quality professional legal service. Despite contentions by the Defendant to the contrary,³ ACCA's goal is not to obtain a special admissions policy for corporate counsel which would exempt them from the requirements set for other attorneys. ACCA's official policy is to identify and eliminate instances where an attorney's practice or privileges are limited by the attorney's employment status.⁴ With regard to bar admissions, ACCA "seeks equal treatment for all attorneys."⁵

¹ AMERICAN CORPORATE COUNSEL INSTITUTE, CORPORATE LAW DEPARTMENT TRENDS AND THE EFFECT OF THE CURRENT BAR ADMISSION SYSTEM: A SURVEY OF CORPORATE COUNSEL (1987) [hereinafter cited as "ACCI Bar Admissions Report"].

² *Is it Time for National Bar Admissions?*, ACCI Symposium at N.Y.U. Law School (June 12, 1987).

³ See Brief of Appellants, at 36-37. To support their assertion that ACCA advocates a separate standard for corporate counsel admission, Defendant cites comments made by a program participant at ACCA's 1985 Annual Meeting. See brief of Appellants, at 36-37, citing, ABA/BNA LAWYERS MANUAL ON PROFESSIONAL RESPONSIBILITY, Vol. 1, No. 50, p. 1095 (Dec. 11, 1985). However, these comments reflect the views of the speaker, not that of the Association.

⁴ ACCA Resolution Concerning Limitations on Corporate Practice, adopted by Board of Directors December 6, 1984.

⁵ ACCA Admission-to-Practice Policy Statement, adopted by Board of Directors May 13, 1986.

In pursuing this policy, ACCA will seek equal treatment for all attorneys. Recognizing that this process will be a lengthy one,

The challenged Virginia admission requirements do not address attorney competence. Instead, they constitute artificial barriers to practice which deter the provision of more cost effective legal services to those corporations that use inside counsel, as well as to the public in general. Thus, this case is of significant interest to the members of ACCA.

STATEMENT OF THE CASE

The Plaintiff in this case, Myrna E. Friedman, is an in-house corporate practitioner and member of ACCA who is employed as Associate General Counsel for ERC International, Inc., a company located in Vienna, Virginia, a suburb of Washington, D.C.

Prior to accepting her current employment with ERC International, Plaintiff, a member of the Bar of the District of Columbia, had been actively engaged in the practice of law, first as an attorney with the Department of the Navy in Arlington, Virginia and then as counsel to the Communications Satellite Corporation (COMSAT) in Washington, D.C. Beginning in 1977, and during this period, Plaintiff was a resident of the State of Virginia. Ms. Friedman accepted her current position at ERC International, Inc., in January 1986, where her responsibilities included advising her client on matters concerning Virginia law. In 1986 she married and moved into her husband's residence in Cheverly, Maryland. In connection with her employment as an attorney for a Virginia corporation, Ms. Friedman sought admission by motion to the Virginia bar but was denied admission on

in the interim the association may support rules or amendments to rules which result in the more efficient delivery of quality legal services to the corporate client, or which otherwise represent a significant improvement in existing admission-to-practice rules. If such rules or amendments result in other-than-equal treatment for all attorneys, Board approval will be sought before any action on behalf of the association is taken. *Id.*

the grounds she was not a permanent resident of Virginia (*see*, Rule 1A:1 of the Supreme Court of Virginia).

SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to make clear its prohibition against residency requirements and other restrictive bar admission criteria unrelated to competency. Such restrictions impede the ability of corporate counsel to efficiently provide legal counsel to their corporate clients and ignore the existence of a growing trend toward the national practice of law. The result of these unrelated restrictions is not protection of the public, but rather protectionism for the state's bar members through a lessening of interstate mobility for experienced, qualified attorneys.

It was properly held by both the federal district and appellate courts that Ms. Friedman's case is controlled by *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), wherein this Court stated:

In summary, the State neither advances a "substantial reason" for its discrimination against non-resident applicants to the bar, nor demonstrates that discrimination practiced bears a close relationship to its proffered objectives. 470 U.S. at 287.

There is no basis for changing this finding merely because the applicants seek admission on motion rather than by examination. Residency in either situation has no bearing on an attorney's competence. Thus the same rationale for rejecting the residency requirement in *Piper* applies here.

That this same issue arises again indicates the urgent need for the Court to establish guidelines for the review of state bar admission restrictions to ensure that they have a substantial relationship to the objective of protecting the public. States invariably claim their bar restrictions have a legitimate objective and are related to

competency. To avoid further repetitious review of state bar requirements and to restore public confidence in the propriety of state bar admission rules this Court should articulate definitive standards to guide lower courts and state bar authorities.

In fashioning such guidelines the Court should take notice of both the existence of a national practice engaged in by major corporate law departments and large U.S. law firms, as well as the existence of a national consensus on relevant admission criteria. State bar restrictions must be reviewed in light of the present day national practice of law. When bar rules conflict with such practice the state should have the burden of proving the rules have a direct and substantial relationship to the objective of protecting the public by ensuring attorney competency. Furthermore, any requirements which are in addition to the three criteria for which there is a national consensus—(1) a degree from an ABA accredited law school; (2) passage of a bar examination; and (3) a character and fitness evaluation—should be shown to be directly and substantially related to competency and aimed at serving a legitimate public purpose.

ARGUMENT

I. ADMISSIONS ISSUES ARE A SERIOUS AND GROWING PROBLEM

The present case before this Court and its proximity in time to this Court's recent decision in *Piper*, 470 U.S. 274 (1985), is not coincidence. The problem of admissions is a growing problem, and one not peculiar to corporate counsel. This is caused in large part by the fact that there exists in the United States a national practice of law which involves the corporate as well as the private bar. As was noted by Professor Michael McChrystal of Marquette University Law School in a paper prepared for a symposium on uniform bar admissions held in June

1987 cosponsored by the New York University School of Law, the American Bar Association, and ACCA:

The state-based system of bar admissions seems anachronistic. This is an era of multistate, even multinational law firms. Legal matters are often oblivious to state boundaries and send lawyers scurrying into the courtrooms and law offices of many states and nations. In sum, the practice of law is frequently multistate, but bar admissions still occur one state at a time.⁶

This *de facto* multistate practice of law occurs with the knowledge and acquiescence of state and local bars. The result, observed another symposium participant, Norman Krivosha, former Chief Justice of the Nebraska Supreme Court, is that:

Overwhelming evidence suggests that one may engage in the interstate practice of law without first being admitted to practice in a particular state, so long as the individual does not appear in court.⁷

This observation is supported by a recent report of the American Corporate Counsel Institute ("ACCI") entitled, "Corporate Law Department Trends and the Effect of the Current Bar Admission System: A Survey of Corporate Counsel."⁸ The report details results of a study of over 250 corporate law departments. The study found that a majority view as appropriate the rendering of legal advice to their corporate clients on matters involving state or federal law in jurisdictions in which they are not admitted. According to the report, 86% indicated that the provision of such advice with regard to

⁶ McChrystal, *National Bar Admissions: Sketching the Issue*, reprinted in, ACCA DOCKET, Summer 1987, at 16.

⁷ Krivosha, *Seeing How It's Broke, How Come We Ain't Fixing It?*, reprinted in ACCA DOCKET, Summer 1987, at 6.

⁸ ACCI Bar Admissions Report, *supra* note 1. (ACCI is the educational and research arm of ACCA.)

federal law was proper, while 58% said it would be appropriate to provide such counsel on the state laws of jurisdictions to which one was not admitted.⁹

In evaluating the proper role of the states in establishing bar admissions criteria, this Court should take into consideration the reality of current legal practice.¹⁰ It makes little sense to permit or encourage admission practices which have little or no contact with reality and are honored by their wholesale disregard.

It is this growing gap between present day legal practice and admission requirements such as that struck down by this Court in *Piper* and the requirement sought to be imposed upon Ms. Friedman which creates the problem. If this problem is not addressed in a considered and comprehensive fashion, it will continue to recur to the detriment of the judiciary, the legal profession, the corporate community, and the public interest.

II. THIS COURT SHOULD ARTICULATE A CLEAR STANDARD AGAINST WHICH THE APPROPRIATENESS OF STATE ADMISSIONS RESTRICTIONS WILL BE MEASURED

This Court has long recognized that states have the authority to regulate the legal profession in order to insure the public of the competence of those who become members of the bar.¹¹ This Court has even articulated a

⁹ *Id.* at 37.

¹⁰ In this Court's decision in *Piper*, it was recognized that geographic proximity had little relevance to competence practice and that modern technology had made multistate practice feasible:

[I]n many situations, unscheduled hearings may pose only a minimal problem for nonresident lawyers. Conference telephone calls are being used increasingly as an expeditious means of dispatching pretrial matters. 470 U.S. at 286, n. 21.

¹¹ See, e.g., *Leis v. Flynt*, 439 U.S. 438 (1979).

test by which that regulation must be guided, that is, there must be a "rational connection between the restriction and the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). ACCA does not question these principles. It does, however, suggest that the standard by which this and other courts must evaluate the rationality of the connection with that objective should be refined.

ACCA submits that any evaluation as to whether a state restriction is legitimate must give due regard to the contemporary reality of practice and the degree to which the restriction is consistent with accepted notions of lawyer competence. It is only by measuring the state restriction against these objective criteria that one can determine whether the real objective of the state restriction is to protect the public. This case presents the proper set of facts to develop and implement such a standard.

Since *Schware*, states invariably contend their admission restrictions are intended to promote competence. The real problem is determining whether the proffered reasons of the state are rationally related and intended to serve this objective. More directly stated, is the state restriction really designed to protect the public or the economic interests of the bar? A recent dispute between New York and New Jersey over reciprocal admissions illustrates the problem of admission criteria being used to serve economic interests.

As was reported by the American Bar Association's periodical the *Bar Leader*:

Lack of reciprocity in bar admissions among several states has prompted the New York State Bar Association to ask the New York Court of Appeals to impose a moratorium on admissions sought by lawyers in such states.

* * * *

Although the resolution applies to all nonreciprocating states, the bar's concerns center on adjacent New Jersey.

* * *

New Jersey's rule has had an economic impact on New York lawyers, particularly those near the New Jersey border, said Eugene Setel of Buffalo, immediate past chairman of the state bar's Committee on Legal Education and Admission to the Bar. 'Several New York state practitioners complained they were being discriminated against,' Setel said. 'They said they lived on the border and were losing business. As soon as lawyers are admitted in New Jersey, they make notes in their diaries to walk across the state line [into New York] in five years.'

* * *

Like New York lawyers, New Jersey lawyers cite a potential economic impact if the state changes its admission rule. They fear lawyers in New York and neighboring Pennsylvania would take away their business.

* * *

The New York state bar's appeal was 'an unnecessary reaction,' said Bernard Conway of Morristown, president of the New Jersey bar. 'The claim that the New Jersey requirement is hampering people is without merit.' Many New York law firms have offices in New Jersey, Conway said. The state bar continues to oppose a rule change, he added.

Ronald Levine of New York, chairman of a New York state bar subcommittee on interstate bar relations, said he took the New Jersey bar exam in February and maintained that it does not test New Jersey law. 'They can't argue that it is needed to be knowledgeable of New Jersey law,' said Levine, who cowrote the legal education committee's report. 'It's just a question of fairness.'¹²

¹² N.Y., *N.J. Bar Feud Over Admission Rules*, ABA BAR LEADER, Nov.-Dec. 1987, at 4.

Most noticeable in this debate is the absence of even the slightest reference to what is in the client's or public interest. A duplicitous situation has arisen in which attorneys and bar officials cite economic concerns when discussing bar rules in the press, but then claim to be only concerned about competency and the public welfare when defending restrictive admission requirements before the courts. The manipulation of bar admission rules for these improper objectives accounts for the conclusion of the ACCI study that:

Current bar admission rules are therefore viewed as artificial barriers which are perceived as ultimately harming both the corporate client, financially and by denying that particular client access to more competent counsel, and the corporate attorney who wishes to be a responsible member of the local legal community.¹³

III. STATE BAR ADMISSION RULES INCONSISTENT WITH THE MULTISTATE PRACTICE OF LAW MUST HAVE A DIRECT AND SUBSTANTIAL RELATIONSHIP TO PROTECTING THE PUBLIC INTEREST BY ENSURING COMPETENCY

Serving the public interest should be the objective of bar restrictions. Ascertaining that interest is not often easy, however. At least in one respect the public has voiced its interest since it has created the multistate practice of law. The move to in-house counsel, like the move to multistate law firms, has been a response to a pressing public need. The public has expressed what serves its needs and courts should be loathe to ignore such a clear expression unless the state can prove the rule has a direct and substantial relationship to protecting the public interest by ensuring competency. Absent that proof, the conclusion must be that the state restriction has an improper objective.

Whether a national bar admission system should be instituted is not before this Court. However, it is clear

¹³ ACCI Bar Admissions Report, *supra* note 1, at 43.

that a national practice of law exists *de facto*. Further, it must be recognized that there are limits to a state's discretion in imposing bar admission requirements, and one such limit is that the rule must be aimed at serving the public interest and not the private interests of the lawyers practicing in a particular state. Given the development of a national practice resulting from the needs of the public, it is incumbent upon states to show that its restrictions are directly and substantially related to a legitimate objective.

In brief, Virginia has a right and obligation to regulate the practice of law to ensure its citizens are protected from incompetent legal counsel. However, this right does not extend to the imposition of standards unrelated to competency,¹⁴ nor to the imposition of standards which are meant to prevent its attorneys from engaging in multistate practice.

The argument that, if residency and other restrictions are removed, states will resort to requiring everyone to pass the bar examination, is little more than a veiled threat inconsistent with logic. Virginia and other states already recognize that having experienced and competent attorneys retake a bar examination is an unnecessary practice. This situation should not change simply because a requirement unrelated to competency is removed.

IV. STATE BAR ADMISSION CRITERIA IN ADDITION TO THOSE UPON WHICH THERE IS A NATIONAL CONSENSUS MUST HAVE A DIRECT AND SUBSTANTIAL RELATIONSHIP TO PROTECTING THE PUBLIC INTEREST BY ENSURING COMPETENCY

The ACCA symposium on bar admissions held in June 1987 at the New York University School of Law revealed a general consensus on bar admission criteria. As was observed by Professor McChrystal:

¹⁴ *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957). See also *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 287 (1985) (holding residency requirement for admission unconstitutional under Article IV, § 2, cl. 1 of the United States Constitution).

There is a widespread agreement among states on the criteria for bar admission. All states impose character and fitness, education, and testing requirements on some or all bar applicants. . . . The national bar admission debate concerns not the widely divergent views regarding appropriate criteria for admission—there are not—but the extent to which these universal criteria should be uniformly applied throughout the states.¹⁵

This consensus is also reflected in a report by the American Bar Association and the National Conference of Bar Examiners.¹⁶ According to the report all 50 states accept applicants for admission who have graduated from an ABA accredited law school, and all of the states have certain testing requirements for most applicants.¹⁷ Forty-six of these states administer the multi-state bar examination.¹⁸ In addition, as this Court has previously noted, all states assess and evaluate the fitness and character of candidates as part of their bar admission requirements.¹⁹

The second element of the test then is to see if the state restriction adds a requirement in addition to the three criteria for which there is national consensus: (1) a degree from an ABA accredited law school; (2)

¹⁵ McChrystal, *supra* note 6, at 16.

¹⁶ A.B.A. SEC. LEGAL EDUC. & ADMISSIONS AND NAT'L CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS (1986).

¹⁷ *Id.* at 8-9.

¹⁸ *Id.* at 14-15.

¹⁹ *Law Students Research Council v. Wadmond*, 401 U.S. 154 (1971).

This Court itself requires of applicants for admission to practice before it that 'their private and professional characters shall appear to be good.' Every State plus the District of Columbia, Puerto Rico, and the Virgin Islands, requires some similar qualification. 401 U.S. at 160 (footnotes omitted).

passing a bar examination; and (3) a character and fitness evaluation.

When a candidate presents himself or herself for admission and possesses each of these criteria, a state should show that any additional requirement has a direct and substantial relation to competency and is aimed at serving a legitimate public purpose. This applies also to situations where a state essentially requires the duplication of a previously obtained objective. For example, if an applicant passed a character evaluation for Illinois, New York should not be permitted to require a second character evaluation unless it demonstrates the Illinois lawyer's character review is unacceptable for New York practice. Another example would be a state requirement that the multistate examination be retaken even though the score would have been more than adequate to pass the state requirement if the examination was taken for that state.

Where a state essentially requires the duplication of previously attained objectives, the duplication without substantially more has to be treated as suspect.

V. THE VIRGINIA RESTRICTION IS NOT DIRECTED AT PROTECTING THE PUBLIC AND SHOULD BE OVERTURNED

Ms. Friedman has been a practicing attorney for more than ten years. Six of these years she has served as an inside corporate counsel. Clearly, Ms. Friedman is an experienced lawyer of the type to which, but for Virginia's residency requirement, the state's admission on motion rule was intended to apply.

It is equally clear, that Virginia's residency requirement conflicts with, and is even intended to prevent, multistate practice.²⁰ Given the restriction's inconsistency with the present day national practice of law, Vir-

²⁰ See Brief of Appellants, at 28.

ginia should be required to prove that its residency restriction has a direct and substantial relationship to protecting the public interest by ensuring competency. This burden cannot be met where the effect of the rule is to discriminate against equally qualified applicants. It is undisputed that someone with the exact same qualifications as Ms. Friedman, who resided in Virginia, would be granted admission. Competency is thus not the distinguishing factor.

The residency requirement imposed by Virginia is one which is in addition to those criteria on which there is a national consensus. The requirement fails to have a direct and substantial relation to competency. Ms. Friedman has met all the consensus criteria for admission. The sole reason she was denied admission on motion by Virginia is that she resides in Maryland. On which side of the Potomac River Ms. Friedman sleeps can hardly be a determinative indication of whether she is a competent and experienced attorney who has "made such progress in the practice of law that it would be unreasonable to require [her] to take [Virginia's] examination." Rule 1A:1 of the Supreme Court of Virginia.

In sum, the reasons offered by Virginia for its residency requirement fall far short of being credible, let alone compelling.

CONCLUSION

ACCA believes the time has come for this Court to acknowledge in explicit terms what has long been recognized by the profession, that state admission criteria are being manipulated in many instances for objectives which are aimed less at the public good than to serve the bar's parochial economic interests. This has resulted, as the ACCI study of the corporate bar has shown, in a perception that these rules harm the clients rather than serve them. This perception should be of grave concern to this Court, as it should be to all lawyers.

Our legal profession can only function successfully if it enjoys the public trust and confidence. It is difficult to maintain that public trust when restrictive rules limiting the mobility of experienced, qualified attorneys are adopted and justified without sufficient connection to the public interest.

This case presents this Court with the opportunity to avert a substantial crisis and rededicate this profession to its primary objective, to serve the public good. By adopting the tests which ACCA advocates, ACCA believes this Court will create an environment which will significantly reduce the abuse of the bar admissions process and reestablish credibility in its propriety.

For these reasons, and because of its conflict with this Court's decision in *Piper*, the Court should affirm the appellate court's ruling below.

Respectfully submitted,

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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

SUPREME COURT OF VIRGINIA,
and its Clerk, DAVID B. BEACH,

Appellants,

v.

MYRNA E. FRIEDMAN,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**BRIEF OF THE NEW YORK STATE BAR
ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF APPELLEE**

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No. 87-399

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**BRIEF OF THE NEW YORK STATE BAR
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IN SUPPORT OF APPELLEE**

Amicus Curiae, New York State Bar Association, respectfully requests this Court to affirm the decision of the Fourth Circuit Court of Appeals.

INTEREST OF AMICUS CURIAE

Amicus Curiae, the New York State Bar Association ("NYSBA"), is a voluntary bar association primarily composed of

members of the bar of the State of New York. The NYSBA has approximately 47,000 members, including lawyers who are engaged in the practice of law in the private and public sectors, as well as judges, professors and law students.

The NYSBA seeks to promote rules and procedures concerning admission to the bar which are fair and equitable, while maintaining a high standard of competence. The rules of admission in New York State permit attorneys who have practiced for a fixed number of years in another state to join the bar of the State of New York by motion and without having to take a bar examination. New York State Court of Appeals Rule § 520.9. The NYSBA believes that the bar of the State of New York has flourished under its open admission rules, and the NYSBA is opposed to barriers to admission not only in New York, but in other states as well in which New York attorneys may wish to practice.

The challenged requirements are another example of artificial barriers to bar admission which promote the economic interests of local lawyers at the expense of rational and just bar admission. This case is therefore of great interest to the members of the NYSBA.

JURISDICTION

The jurisdictional grounds are fully set forth in the Brief of the Appellee and need not be set forth here again in accordance with Rule 36.5 of this Court.

SUMMARY OF ARGUMENT

The nature and reality of the practice of law in the United States is that an attorney often needs to represent clients in a number of states, and may wish to establish offices in two or more states. The courts below correctly set aside Rule 1A:1(c) as unconstitutional discrimination. Virginia's Rule employs the bar examination requirement as an artificial and unnecessary barrier to the admission of nonresident attorneys. Virginia discourages experienced out-of-state attorneys from joining its bar by requiring that the experienced attorneys take another

bar examination, or move into the state and practice there on a full-time basis.

The Appellee has fully briefed the issues surrounding the violation of the Privileges and Immunities Clause. The NYSBA wishes to emphasize to the Court that the bar examination requirement has been used by some states as an improper mechanism to limit competition by experienced attorneys from other states.

ARGUMENT

THE PRIVILEGES AND IMMUNITIES CLAUSE PREVENTS A STATE FROM USING A BAR EXAMINATION TO PUT AN UNREASONABLE BURDEN ON PRACTICE BY OUT-OF-STATE ATTORNEYS

According to the Appellants, twenty-three jurisdictions recognize that it is not necessary to re-examine lawyers qualified in other states in order to admit them to the bar. Appellants' Brief, at page 9. These jurisdictions, which include New York, have found that attorneys who have demonstrated their professional abilities in practice in other jurisdictions are fully competent to practice law without being subjected to the needless burden of a bar examination.

Experienced attorneys should be admitted by motion no matter where they reside or where they have practiced. There has been a marked trend toward uniformity of both substantive and procedural laws throughout the United States. All states, except one, have adopted the Uniform Commercial Code. Model codes, model rules and the Restatements have become a common language for all lawyers. Federal law, whether it be tax, criminal, labor or environmental, is a significant part of the common practice of all lawyers.

Whether it is due to a lawyer's decision to move to another state, or an out-of-state client or matter, today's lawyer may well represent clients in states other than those in which he or she

began practice. Indeed, the Court has recognized the value of a nonlocal lawyer to a client:

A client may have a number of excellent reasons to select a nonlocal lawyer: his or her regular lawyers most familiar with the legal issues may be nonlocal; a nonresident lawyer may practice a specialty not available locally; or a client may be involved in an unpopular cause with which local lawyers are reluctant to be associated. See *Piper*, 470 U.S., at 281, 84 L.Ed. 2d 205, 105 S.Ct. 1272.

Frazier v. Heebe, 107 S.Ct. 2607, 2614 n. 12 (1987).

Pro hac vice admission is often not a satisfactory alternative to plenary admission. Such admission applies only to court appearances, not to counseling. Further, states have made *pro hac vice* admission a difficult, if not impossible, undertaking. The Court has observed that *pro hac vice* admission is purely discretionary and not a freely available alternative. *Frazier v. Heebe*, 107 S.Ct. 2607, 2614 n. 13 (1987); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 277 n. 2 (1985).

As the Fourth Circuit held, the costs, time and delay involved in taking a bar examination impose a heavy burden on the out-of-state practitioner. *Friedman v. Supreme Court of Virginia*, 822 F.2d 423, 427 (4th Cir.), *prob. juris. noted*, *Supreme Court of Virginia v. Friedman*, 108 S.Ct. 283 (1987). The bar examination has been employed as a form of economic protectionism to deter out-of-state attorneys from entering the local legal markets. *Id.* See also *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 285 n. 18 (1985) ("Many of the states that have erected fences against out-of-state lawyers have done so primarily to protect their own lawyers from professional competition"). Indeed, the Appellants themselves have expressed their concern that if Virginia's restrictive rule is lifted: "the number of reciprocity admissions in Virginia would skyrocket...". Brief of Appellants, filed with Fourth Circuit, at p. 22.

While the NYSBA does not quarrel with each state's right to impose its own standards for bar admission, the NYSBA opposes the use of bar examinations as a mechanism to restrict the delivery of legal services. One legal commentator has observed that:

States recognizing no reciprocity and states requiring special attorneys' bar examinations fall almost entirely into two categories: (1) states in the Southeast or the Far West and (2) states in the Northeast, which serve as "bedroom" or "second home" areas for attorneys from nearby major legal centers. It is apparent that the states restricting admission by reciprocity are jurisdictions in which the local bar is subject to the potential influx of attorneys admitted in other jurisdictions because of expanding population, economic growth, or the movement of attorneys into suburban areas, second home, or retirement communities. *It has been asserted, with justification, that those states that have made the admission of attorneys most difficult have done so primarily to protect the economic interests of the local bar.*

Haftner, *Toward the Multistate Practice of Law Through Admission by Reciprocity*, 53 Miss. L.J. 1, 5-6 (1983) (footnotes omitted; emphasis added).

Members of the New York State bar have complained to the NYSBA about our neighboring state of New Jersey which requires that experienced attorneys pass the New Jersey bar examination. New Jersey cannot even argue that its examination is required so that all attorneys are proficient in local law. The New Jersey examination, which is basically a multistate examination, does not require knowledge of New Jersey law on the part of the examinee. Clerk of the Supreme Court of New Jersey, *Admission to the Bar* (March 1987) ("[w]hile knowledge of New Jersey law will not be critical to success on the examination, familiarity with new law or distinctive cases will aid you in preparing your responses to the questions"). A former President of the New Jersey State Bar Association has reportedly admitted

that the main argument in favor of restrictive rules is "protectionism," and has been quoted as follows: "New Jersey is [Benjamin] Franklin's keg tapped at both ends. The concern for the Newark lawyers is that New York lawyers will simply come in and treat Newark as a sixth borough, and in the southern part of the state the concern is over Philadelphia lawyers." Lauter, *Wliving Into Another Bar Isn't Always a Real Breeze*, National Law Journal, Mar. 17, 1986, at 1, 32.

In response to a recent NYSBA request that New Jersey adopt motion admissions, another former President of the New Jersey State Bar Association wrote the NYSBA that his Association's Board had voted against motion admission because: "One of our main problems is that we are sandwiched between New York City and Philadelphia. There are currently 30,742 lawyers admitted to practice in our state and the Board felt that in good conscience they could not support your proposition." Letter from J.L. White to NYSBA, dated May 22, 1986 (Appendix A hereto).

CONCLUSION

The Virginia Rule at issue employs the bar examination requirement as an artificial and unnecessary barrier to the admission of nonresident attorneys. The decision of the court below should be affirmed.

Respectfully submitted,

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February 4, 1988

APPENDIX

APPENDIX A

NEW JERSEY
STATE BAR ASSOCIATION
Headquarters 172 WEST STATE STREET, TRENTON, N.J. 08608
609-394-1101

May 22, 1986

New York State Bar Association
600 First Federal Plaza
Rochester, New York 14614

Attention: Justin L. Vigdor, Esquire

Dear Justin:

I discussed your letter of April 21, 1986 with our Board of Trustees at a regular meeting on May 15, 1986.

After a lively discussion, the Board voted against supporting motion admissions in New Jersey. I believe this is consistent with earlier positions which other Boards have taken.

One of our main problems is that we are sandwiched between New York City and Philadelphia. There are currently 30,742 lawyers admitted to practice in our state and the Board felt that in good conscience they could not support your proposition.

Best personal regards,

Sincerely,

John L. White

JLW: tk

cc: Raymond R. Trombadore, Esquire
Dalton W. Menhall, Esquire